THE REVIEW

FOIA

Freedom of Information Act

JULY 1983

In response to suggestions made by records custodians from across the Commonwealth, the Public Records Division of the Massachusetts Secretary of State's Office has developed ***The Review.*** A quarterly publication, ***The Review*** contains summaries of determinations, pending litigation, and other pertinent information concerning public records.

The Freedom of Information Act, as substantially amended in 1973, provides that all records be available to the public unless specifically exempted under the law. And in 1977, the law was further amended to give the Supervisor of Public Records authority over public records belonging to municipal, county and state government agencies.

The Review is designed as a quick, easy reference tool for anyone interested in the Freedom of Information Act, 950 C.M.R. 32, or public records access laws, G.L. c. 4, s. 7 (26). Divided into four sections and printed on three-hole paper, ***The Review*** is easy to use and keep up-to-date.

To further clarify public records laws for records custodians and requesters, the Public Records Division has also published a series of brochures examining exemptions, responsibilities and guidelines.

Please contact the Public Records Division for this information.

So, it is with great enthusiasm that I announce this first issue of ***The Review*** – a publication to ensure the proper interpretation of the Massachusetts General Laws.

James W. Igoe
Supervisor of Public Records

Subject Index

Determinations

SPR 82/115 **8/6/82**

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Held: **The SPR affirmed. G.L. c. 59, s. 60 provides that abatement applications are open only to certain named government officials' inspection.**

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Held: **The exemptions are inapplicable when a specific statute compels disclosure.**

Rationale: Board of Education Regulations in 603 C.M.R. 23:07 (4) and G.L. c. 71, s. 37 arguably prohibit disclosure of student records. However, G.L. c. 51, s. 4 requires school committees to disclose lists of children and their addresses.

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Issue: A town librarian sought an interpretation of SPR 442, which held that records of transactions not revealing "the substance of an intellectual pursuit" are public. Thus, records identifying library card holders, those using library facilities and delinquent borrowers were held public. Would a list of borrowers fall within the privacy exemption, G. L. c. 4, s. 7 (26) (c)?

Held: **No, provided that the list does not indicate which specific books were borrowed. The SPR noted further that: 1) the identity and purpose of a requester are not relevant; and 2) a custodian has the discretion to disclose exempt records, absent a specific statutory prohibition.**

SPR 82/54 **5/25/82**

Issue: A news service sought from the Division of Employment Security (DES): 1) the names and addresses of employers delinquent in paying Massachusetts employment security taxes; and 2) the amounts each owed.

Held: **Statutorily exempt. See G. L. c. 4, s. 7 (26) (a). G.L. c. 151A, s. 46 prohibits disclosure of information obtained by the DES pursuant to G.L. c. 151A, s. 46. It protects the confidentiality of employers as well as employees.**

Rationale: The clear language of s. 46 should be observed.

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Issue: The Department of Public Health sought an advisory opinion as to whether G.L. c. 4, s. 7 (26) (c) exempted from disclosure the names and addresses of those who have filed urea formaldehyde foam insulation repurchase requests with the Department of Public Health.

Held: **No. There is a minimal privacy interest in the information that one has filed a repurchase request and in the inferences drawn therefrom. The public interest in disclosing participants in a government program is weightier.**

Rationale: The public interest in disclosure must be weighed against the seriousness of the privacy invasion. In order to find that disclosure may constitute an unwarranted invasion of personal privacy, the privacy invasion must outweigh the public's right to know. The law firm requesting the information was seeking to notify potential class action members of a suit against the manufacturer. Disabled Officer's Association v. Rumsfield, 428 F. Supp. 454 (D. D. C. 1977), was cited for the proposition that disclosure would benefit those who had made repurchase requests. See U.S. Dept. of State v. Washington Post, 50 U.S.L.W. 4522, regarding protection of individual privacy.

SPR 1017 **3/3/82**

Issue: Sought from the Division of Food and Drugs, Dept. of Public Health, were records on formaldehyde-level tests at 49 homes. The records contained: 1) names, addresses and telephone numbers of homeowners tested; 2) names, ages, and sex of residents; 3) health problems found; 4) information on formaldehyde foam installer; 5) general information on the foam and its effects; 6) the inspector's report; and 7) any remedial action of the manufacturer or installer. All 49 homeowners had either a) filed insulation repurchase requests with the Dept. of Public Health, or b) filed civil actions in court. The record custodian denied the request, relying on the G.L. c. 4, s. 7 (26) (c) privacy exemption.

Held: **Public, except for medical information and telephone numbers.**

Rationale: Citations to: Robles v. EPA, 484 F.2d 843 (4th Cir. 1973) (survey of homeowners sited on uranium tailings was public); A.G. v. Board of Assessors of Woburn, 375 Mass. 430 (1978) (field assessment cards containing detailed descriptions of homes are public); Cunningham v. Health Officer of Chelsea, 7 Mass. App. Ct. 861, 385 N.E.2d 1011 (1979) (complaints, inspection reports and correspondence pertaining to housing code violations are public). Repurchase requests and lawsuits belie any privacy expectation. Thus, the records concern information not shared only with a government agency. Data in records may be found elsewhere, e.g., in street lists and field assessment cards. Other data are inherently not personal, e.g., that relating to foam installers. But the privacy interest outweighs the public interest as to medical information and telephone numbers.

Determinations

SPR 82/114 **7/14/82**

Issue: A welfare recipient sought: 1) the minutes of a meeting between the record requester and the Welfare Office concerning the requester's case; 2) the original letter (and envelope) informing the requester of her transfer from the supervision of one Welfare Office to another.

Held: **Since no minutes were made, there was nothing to disclose. The original envelope was not kept.**

Rationale: A records custodian may not be compelled to create records just to satisfy a request. Copy of and access to an existing, non-exempt letter are required, but not delivery of an original document.

SPR 82/117B **10/8/82**

Issue: A public school superintendent sought an opinion regarding the legality of a policy prohibiting teachers from furnishing names of pupils or employees without the superintendent's written permission.

Held: **Teachers are custodians and subject to G.L. c. 66, s. 10. The superintendent must provide timely permission in order that teachers can meet the requirement of disclosure within 10 days of receiving a request. References were made to G.L. c. 4, s. 7 (26); c. 66, s. 10; 950 C.M.R. 32:00; SPR nos. 82/117 and 82/70.**

SPR 82/125 **8/6/82**

Issue: A newspaper sought from the Director of Veterans' Services Dept. the following: names and addresses of 464 veterans, their spouses and dependents, etc., who in 1942-1982 allegedly received illegal veterans' benefits under G.L. c. 115. The custodian said the records sought were statutorily exempt from disclosure. See G.L. c. 4, s. 7 (26) (a). The custodian cited G.L. c. 40, s. 51, which prohibits any "town or officer thereof" from disclosing the names of town residents who have received c. 115 veterans' benefits.

Held: **Despite the possible strong public interest in disclosing the names of those who have fraudulently received veterans' benefits, specific legislation prevents disclosure of the records requested. See G.L. c. 66, s. 18; St. 1978, c. 367, s. 54A.**

SPR 82/139 **8/19/82, 9/1/82**

Issue: An attorney appealed a town's charge of $75.00 for records copied. The custodian's lowest paid ($6.25/hr.) employee took six hours to locate and copy 93 pages of requested records.

Held: **The $75.00 charge was unreasonable. Refund of $28.20 was ordered.**

Rationale: G.L. c. 66, s. 10 (a) requires that fees charged must be "reasonable" and limited to the "actual expense" of providing the records. Regulations in 950 C.M.R. 32.2.5 provide further that 10-cents per page is the normal

copying fee; that an additional reasonable fee is proper where services performed exceed "standard office procedures;" and that services taking over 20 minutes shall not be included in "standard office procedures." The requester may be assessed only directly incurred costs, i.e., the cost of searching, segregating and copying. Thus, neither the costs of creating the record nor the requester's financial resources and motives are relevant. The burden of providing public records imposed on custodians represents a legislative policy choice. See October 20, 1977 Op. Atty. Gen. No. 10 (upholding SPR's fee-setting authority); SPR v. Revere (Mass. Super. No. 25839, Suffolk, 5/10/78) (SPR's fees reasonable). The correct charge is $46.80 (93 copies @ 10-cents per page plus six hours labor @ $6.25/hour). Upon a second appeal, following the town's statement that searching, copying and refiling records took six hours, held, the town's claimed costs were reasonable, since the request covered five years' records.

SPR 82/141 10/1/82

Issue: Sought from a consultant under contract with a town Board of Assessors were data concerning: the location, zoning district, and the names and addresses of all owners of rental units in town. The consultant was conducting an audit to be used to obtain Dept. of Revenue revaluation certification as mandated by G.L. c. 58, s. 1A. Issues under G.L. c. 4, s. 7 (26) are: 1) Was the data effectively received by the Board of Assessors? 2) Is the consultant a unit of the Board? 3) Is exemption (d) applicable?

Held: **A test focusing on who physically possesses data is not sufficient, for a mere possession test would permit insulation from disclosure. See Ryan v. Dept. of Justice, 617 F.2d 781, 785 (D.C. Cir. 1980). The data sought are equivalent to a record received by the Board. The consultant is a unit of the Board. Revaluation and classification records themselves are not exempt. A record is a public record once it is created, and need not first be approved or adopted by the Board.**

Rationale: The consultant is performing part of the Board's statutory functions under c. 59, s. 38. The criteria as to whether the consultant is a Board unit are: 1) the governmental function performed; 2) the level of governmental funding; 3) the extent of governmental involvement or regulation; and 4) whether the entity was created by the government. Board of Trustees of Woodstock Academy v. FOI Comm'n, 436 A.2d 266, 270-71 (Conn. 1980). G.L. c. 4, s. 7 (26) (d) applies to deliberations and recommendations on legal or policy matters, not to factual data. E.P.A. v. Mink, 410 U.S. 73, 89 (1973); Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Once the data have been collected, the consultant's function is factual and mathematical. The data represent a "reasonably completed factual stud(y)" as described in exemption (d). Revaluation and classification data are essentially the same data as that contained on field assessment cards, which are public. A.G. v. Board of Assessors of Woburn, 375 Mass. 430, 434 (1978).

Determinations

SPR 82/148 **9/23/82**

Issue: An appeal regarding the charge for copies of minutes of CHARMSS, an education collaborative. Is CHARMSS subject to G.L. c. 66, s.10 requirements?

Held: Yes. CHARMSS is an "agency" (or the functional equivalent) within the meaning of c. 4, s. 7 (26). The charge of 25-cents per page was in excess of the fees permitted under 959 C.M.R. 32.2.5. A refund was ordered.

Rationale: CHARMSS is an education collaborative established by G.L. c. 40, s. 4E. CHARMSS is also a collection of entities each individually subject to the public records law. In addition, several factors show CHARMSS to be the functional equivalent of an agency: 1) it provides services which could be provided by member school committees; 2) it is completely funded by same; 3) its board of directors is composed of member schools' superintendents; 4) it is regulated by the Mass. Dept. of Education. See Board of Trustees of Woodstock Academy v. FOI Comm'n, 436 A.2d 266, 270-71 (Conn. 1980).

SPR 82/149 **10/7/82**

Issue: Sought from the Dept. of Revenue were: current and recent lists of individual and corporate tax delinquents, their addresses, amounts owed and dates of delinquency. Are the lists statutorily exempt from disclosure under G.L. c. 4, s. 7 (26) (a)?

Held: G.L. c. 62C, s. 21 (a) exempts most tax return data with specified exceptions. G.L. c. 62C, s. 21 (b) (11) permits disclosure of tax delinquency lists under certain conditions, including where delinquency is in excess of $5,000 and where advance notice of disclosure is given to the delinquent. Diligent search for the records is required. The Dept. of Revenue must secure the approval of the Records Conservation Board before destroying tax records. G.L. c. 30, s. 42.

SPR 82/154 **9/23/82**

Issue: An advisory opinion was sought regarding records held by the State Boxing Commission Chairman regarding a boxing promoter. Are the records exempt under G.L. c. 4, s. 7 (26) (c) (privacy exemption) or (f) (investigatory exemption)?

Held: G.L. c. 4, s. 7 (26) exempts from disclosure the applicants' home telephone numbers and physical characteristics as found within applications for a license to conduct boxing matches. G.L. c. 4, s. 7 (26) (f) exempts complainants' names and other identifying information. The content of complainants' letters are public.

Rationale: There is little public interest in disclosing applicants' telephone numbers and physical characteristics since same does not bear on one's qualifications for a license. Such data are "intimate details" and are within the privacy exemption. A.G. v. Asst. Cmm'r of the Real Property Dept., 1980 Mass. Adv. Sh. 1203. As to (f), investigatory sources

and citizens' willingness to come forward and speak are threatened by disclosure of complainants' identities. Reinstein v. Police Cmm'r of Boston, 378 Mass. 281, 289 (1979); Bougas v. Chief of Police of Lexington, 371 Mass. 59 (1976).

SPR 82/155 10/8/82

Issue: An advisory opinion was sought by a Town Appraiser, Office of the Board of Assessors, regarding a newly adopted public records policy. The policy suggested: 1) that records requests be written; 2) that requesters identify themselves to prevent making records requests in order to harass another; 3) a flat fee of "$1.00 per parcel" for requested records; 4) the fees to be charged for preparing certified abuttors' lists.

Held: 1) Written requests may not be required, except where the record's public status is uncertain. See 950 C.M.R. 32.2.3. 2) But a custodian need not read the requested record over the telephone, and advance payment of costs may be demanded. 3) A flat $1.00 per parcel fee is improper. Fees are limited to 10-cents per copied page, unless the actual cost is greater. The pro-rata hourly wage of the lowest-paid employee qualified to search for the records, if the search takes over 20 minutes, plus postage, may be charged. See 950 C.M.R. 32:00. The fees established represent ceilings, so the maximum need not be charged. 4) Preparing certified abuttors' lists involves creating a new record and certifying same, which actions are outside the scope of the public records law. Thus, the fees established under the public records law are inapplicable here.

SPR 82/156 9/14/82

Issue: Appeal from a fee charged by a school superintendent for records pertaining to non-resident student admissions. Requester alleged that the record copy received was not the record requested. The superintendent refused to process further requests until the outstanding charges were paid.

Held: The record sent meets the description in the request. A more detailed request was suggested if a different record was desired, so the superintendent was entitled to a 10-cent fee for the page that was copied and sent. The superintendent's fee arrangement was a reasonable means of ensuring payment for copies.

SPR 82/167 9/23/82

Issue: A newspaper originally requested from a town retirement board a record of "names, ages and former jobs of the top 10 pension recipients." After the custodian denied the request, the requester appealed. Included in that appeal were requests for additional information regarding the same 10 pensioners' dates of employment and the amounts of their pensions. The SPR ordered disclosure of the information origin-

SPR 82/167 9/23/82 (continued)

ally requested, but declined to address the status under the public records law of the additional requests, since the additional information had not been requested from the custodian. SPR no. 82/95. See G.L. c. 66, s. 10 (b); 950 C.M.R. 32.4.2. The requester then sought records of the employment and pension amounts from the custodian, who argued that the Supervisor's failure to order disclosure of that data in his original determination relieved the custodian from the obligation to disclose it.

Held: **The public interest in pensioners' dates of employment and pension amounts outweighs their privacy interest in non-disclosure, thus the information is not exempt under G.L. c. 4, s. 7 (26) (c). The privacy interest recognized by G.L. c. 214, s. 1B is more limited than that encompassed by exemption (c), so c. 214, s. 1B does not require a custodian to obtain a release from each record subject prior to the disclosure of pensioners' public records.**

Rationale: A balancing of public and private interests is required. A.G. v. Comm'r of the Real Property Dept., 380 Mass. 623 (1980). The public interest in compliance with pension requirements is served by disclosure of pensioners' dates of employment. The minimal privacy interest in these data is evidenced by G.L. c. 7, s. 30, which provides that a state employee's date of employment is public. There can be no greater privacy interest for a town pensioner. As to pension amounts as public records, see Globe Newspaper Co. v. Boston Retirement Board, Suff. Super. Ct. No. 33623 (1981), aff'd, 388 Mass. 427 (1983); cf. Hastings & Sons Pub. Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978) (financial data regarding individual police officers, contained in municipal payroll records, are public).

SPR 82/169 9/24/82

Issue: The SPR declined to intervene in parents' dispute with public school regarding a 25-cents per page copying fee charged for their son's student record. G.L. c. 71, s. 34D gives the State Board of Education the authority to promulgate regulations governing access to and duplication of student records. See 603 C.M.R. 23.07 (2) (a) for fee regulations.

SPR 82/06 4/22/82

Issue: Sought from the Commissioner, Mass. State Police, Dept. of Public Safety: records regarding the death of a man in a town police department lockup. An in camera inspection was made to determine the applicability of the privacy and investigatory exemptions, G.L. c. 4, s. 7 (26) (c) and (f).

Held: **Privacy is a personal right which ends with death. Data regarding public employee's performance of routine duties are not exempt from disclosure. But the lack of a public interest and the potential for embarrassment exempt the name, address, date of birth and social security number of an inmate named in the requested memo who happened to be in the lockup at the time of the other man's death. The remainder of the record is public.**

SPR 82/06 4/22/82 (continued)

Rationale: A balancing of public and private interests is required under s. 7 (26) (c). Exemption (f) is inapplicable. None of the considerations in Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 289 (1979) applies.

SPR 82/14 3/3/82

Issue: Tape recordings of a public meeting of a Town Conservation Commission were sought. The town argued: 1) release of the tapes was against town policy; 2) the tapes were the secretary's personal property and used only to prepare minutes; 3) tapes were not approved or filed with the town clerk; 4) Commission members would have spoken with less candor had they known disclosure of the tapes would occur. Some of the records no longer exist. Some tapes were reused with no transcription except for the parts included in the official minutes.

Held: **Any extant tapes, notes or transcripts are public records. See G.L. c. 4, s. 7 (26).**

Rationale: G.L. c. 39, s. 23B, which permits anyone attending a public meeting to record same, renders the "candor" argument groundless.

SPR 82/31 9/30/82

Issue: An attorney sought from Morton Hospital five hospital policy or procedure manuals and a nursing schedule. The hospital is a private, nonprofit corporation, although it is regulated by government agencies. Most of the records sought are required to be kept by law.

Held: **The requested records were not made or received by a governmental entity, within the meaning of G.L. c. 4, s. 7 (26).**

Rationale: See Bello v. South Shore Hospital, 1981 Mass. Adv. Sh. 2411 (despite government funding, licensing and regulation, and tax exemption, hospital is a private institution subject to private control). Even though the Department of Public Health may have a right to receive the requested records, this unexercised right alone does not transform the requested information into records made or received by a government entity. Westinghouse Broadcasting Co. v. Sergeant-at-Arms, 375 Mass. 179, 184 (1978).

Pending Litigation

The only pending litigation that is a result of a public records appeal made to the Supervisor of Public Records is Francis X. Bellotti, Attorney General v. Board of Appeals of the Town of Milton, (Civil Action No. 46208), which has been filed in Suffolk Superior Court.

On July 29, 1980 a request was made to the Milton Board of Appeals for a copy of a June 18, 1980 letter from Town Counsel to the Board. The request was subsequently denied and an appeal was filed with the Supervisor of Public Records for a determination on the public records status of the letter. When the Board refused to submit the document to the Supervisor of Public Records for an in camera inspection, the Attorney General filed suit and on the Attorney General's motion for partial summary judgment pursuant to Mass. R. Civ. P., Rule 56, the court ordered the Board of Appeals to submit a copy of the letter to the Supervisor for an in camera inspection. Once the Supervisor had completed his in camera and determined the letter to be a public record, he ordered the Board of Appeals to disclose the record. The Milton Board of Appeals refused to comply with the Supervisor's order, necessitating the Attorney General to file suit.

At this time, Tony Sager, Assistant Attorney General, has moved for summary judgment, filed a brief and is waiting for the court to schedule a hearing.

Pending Legislation

Several bills have been filed this Legislative Session that would impact on the public records laws, G.L. c. 66, s. 10, and G.L. c. 4, s. 7 (26). H 829, a bill re-filed by Rep. Angelo Marotta, has already passed both the House and Senate and was signed by the Governor on March 28, 1983. This bill amends G.L. c. 66, s. 10 by requiring the clerks of every city and town to post a notice in the city or town hall stating that any citizen is entitled to a copy of a public record for a fee specified in G.L. c. 66. Another bill that is quickly moving through the Legislature is H 4606 filed by Rep. Alfred Saggese, Jr. and Senator George Bachrach. This bill amends section 7 of chapter 78 by making confidential all public library registration or circulation records which reveal the identity of the borrower.

Three other bills that have been filed this session, H 2507, H 3869 and S 1036, would amend the definition of a public record, G.L. c. 4, s. 7 (26), by including an exemption for records compiled in anticipation of litigation or are relevant to pending litigation. H 2507 and S 1036 have been reported out of committee unfavorably and H 3869 has been referred to the Committee on Joint Rules for a study and investigation.

Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427 (1983)

Facts: The Boston Globe requested access to information pertaining to former employees of the City of Boston who were receiving disability pensions. The Boston Retirement Board did not formally respond to the request. As a result, the Globe filed a petition with the Supervisor of Public Records seeking an administrative determination as to whether the information sought was subject to mandatory disclosure pursuant to M.G.L. c. 66, s. 10. The Supervisor ordered the Board to make the information available and the Board refused. The Superior Court then ordered the Board to disclose the information except a cursory statement of the medical reason for granting the disability. The Globe appealed.

Issue: Whether medical files or information are absolutely exempt from disclosure under exemption (c) of M.G.L. c. 4, s. 7 (26).

Holding: Yes.

Rationale: The Supreme Judicial Court reviewing the grammatical construction of the statute and the legislative intent held that the clause, "the disclosure of which may constitute an unwarranted invasion of personal privacy," which requires a balancing of the public interest in disclosure against the privacy interests which may be harmed by disclosure did not modify the phrase "personnel and medical files or information." The Court reasoned that in the case of personnel and medical information the Legislature saw the need to establish a sensitive and particularized balance between the public interest in disclosure and the individual's interest in personal privacy. Therefore the first clause of M.G.L. c. 4, s. 7 (26) (c), operates to absolutely exempt from mandatory disclosure medical and personnel files or information which are of a personal nature and relate to a particular individual.

Connolly v. Bromery, 15 Mass. App. Ct. 661 (1983)

Facts: The appellants, students at the University of Massachusetts at Amherst, sought disclosure of faculty performance evaluations by students pursuant to M.G.L. c. 66, s. 10. This request was denied. The students initiated an action in the Superior Ct. under M.G.L. c. 66, s. 10 (b) to compell disclosure of the records. The Superior Court judge decided that the requested faculty evaluations constituted personnel files or information which is exempt from mandatory disclosure. The students appealed.

Issue: Whether faculty performance evaluations by students constitute personnel information within the meaning of the first clause of exemption (c) to the definintion of public records found at M.G.L. c. 4, s. 7 (26).

Holding: Yes.

Appellate Court Decisions (continued) – **Connolly v. Bromery**

Rationale:

The Appeals Court found the holding in Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983) to be controlling. The court concluded that the students' evaluations of individual faculty were records likely to be found in a personnel file and as raw data appraising the job performance of individuals, it was particularly personal and volatile. Accordingly, the court held that the evaluations were personnel information which is outside the category of a public record.

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Held: **No, provided that the list does not indicate which specific books were borrowed. The SPR noted further that: 1) the identity and purpose of a requester are not relevant; and 2) a custodian has the discretion to disclose exempt records, absent a specific statutory prohibition.**

SPR 82/54 **5/25/82**

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Rationale: The public interest in disclosure must be weighed against the seriousness of the privacy invasion. In order to find that disclosure may constitute an unwarranted invasion of personal privacy, the privacy invasion must outweigh the public's right to know. The law firm requesting the information was seeking to notify potential class action members of a suit against the manufacturer. Disabled Officer's Association v. Rumsfield, 428 F. Supp. 454 (D. D. C. 1977), was cited for the proposition that disclosure would benefit those who had made repurchase requests. See U.S. Dept. of State v. Washington Post, 50 U.S.L.W. 4522, regarding protection of individual privacy.

SPR 1017 **3/3/82**

Issue: Sought from the Division of Food and Drugs, Dept. of Public Health, were records on formaldehyde-level tests at 49 homes. The records contained: 1) names, addresses and telephone numbers of homeowners tested; 2) names, ages, and sex of residents; 3) health problems found; 4) information on formaldehyde foam installer; 5) general information on the foam and its effects; 6) the inspector's report; and 7) any remedial action of the manufacturer or installer. All 49 homeowners had either a) filed insulation repurchase requests with the Dept. of Public Health, or b) filed civil actions in court. The record custodian denied the request, relying on the G.L. c. 4, s. 7 (26) (c) privacy exemption.

Held: **Public, except for medical information and telephone numbers.**

Rationale: Citations to: Robles v. EPA, 484 F.2d 843 (4th Cir. 1973) (survey of homeowners sited on uranium tailings was public); A.G. v. Board of Assessors of Woburn, 375 Mass. 430 (1978) (field assessment cards containing detailed descriptions of homes are public); Cunningham v. Health Officer of Chelsea, 7 Mass. App. Ct. 861, 385 N.E.2d 1011 (1979) (complaints, inspection reports and correspondence pertaining to housing code violations are public). Repurchase requests and lawsuits belie any privacy expectation. Thus, the records concern information not shared only with a government agency. Data in records may be found elsewhere, e.g., in street lists and field assessment cards. Other data are inherently not personal, e.g., that relating to foam installers. But the privacy interest outweighs the public interest as to medical information and telephone numbers.

Determinations

SPR 82/114 **7/14/82**

Issue: A welfare recipient sought: 1) the minutes of a meeting between the record requester and the Welfare Office concerning the requester's case; 2) the original letter (and envelope) informing the requester of her transfer from the supervision of one Welfare Office to another.

Held: **Since no minutes were made, there was nothing to disclose. The original envelope was not kept.**

Rationale: A records custodian may not be compelled to create records just to satisfy a request. Copy of and access to an existing, non-exempt letter are required, but not delivery of an original document.

SPR 82/117B **10/8/82**

Issue: A public school superintendent sought an opinion regarding the legality of a policy prohibiting teachers from furnishing names of pupils or employees without the superintendent's written permission.

Held: **Teachers are custodians and subject to G.L. c. 66, s. 10. The superintendent must provide timely permission in order that teachers can meet the requirement of disclosure within 10 days of receiving a request. References were made to G.L. c. 4, s. 7 (26); c. 66, s. 10; 950 C.M.R. 32:00; SPR nos. 82/117 and 82/70.**

SPR 82/125 **8/6/82**

Issue: A newspaper sought from the Director of Veterans' Services Dept. the following: names and addresses of 464 veterans, their spouses and dependents, etc., who in 1942-1982 allegedly received illegal veterans' benefits under G.L. c. 115. The custodian said the records sought were statutorily exempt from disclosure. See G.L. c. 4, s. 7 (26) (a). The custodian cited G.L. c. 40, s. 51, which prohibits any "town or officer thereof" from disclosing the names of town residents who have received c. 115 veterans' benefits.

Held: **Despite the possible strong public interest in disclosing the names of those who have fraudulently received veterans' benefits, specific legislation prevents disclosure of the records requested. See G.L. c. 66, s. 18; St. 1978, c. 367, s. 54A.**

SPR 82/139 **8/19/82, 9/1/82**

Issue: An attorney appealed a town's charge of $75.00 for records copied. The custodian's lowest paid ($6.25/hr.) employee took six hours to locate and copy 93 pages of requested records.

Held: **The $75.00 charge was unreasonable. Refund of $28.20 was ordered.**

Rationale: G.L. c. 66, s. 10 (a) requires that fees charged must be "reasonable" and limited to the "actual expense" of providing the records. Regulations in 950 C.M.R. 32.2.5 provide further that 10-cents per page is the normal

copying fee; that an additional reasonable fee is proper where services performed exceed "standard office procedures;" and that services taking over 20 minutes shall not be included in "standard office procedures." The requester may be assessed only directly incurred costs, i.e., the cost of searching, segregating and copying. Thus, neither the costs of creating the record nor the requester's financial resources and motives are relevant. The burden of providing public records imposed on custodians represents a legislative policy choice. See October 20, 1977 Op. Atty. Gen. No. 10 (upholding SPR's fee-setting authority); SPR v. Revere (Mass. Super. No. 25839, Suffolk, 5/10/78) (SPR's fees reasonable). The correct charge is $46.80 (93 copies @ 10-cents per page plus six hours labor @ $6.25/hour). Upon a second appeal, following the town's statement that searching, copying and refiling records took six hours, held, the town's claimed costs were reasonable, since the request covered five years' records.

SPR 82/141 10/1/82

Issue: Sought from a consultant under contract with a town Board of Assessors were data concerning: the location, zoning district, and the names and addresses of all owners of rental units in town. The consultant was conducting an audit to be used to obtain Dept. of Revenue revaluation certification as mandated by G.L. c. 58, s. 1A. Issues under G.L. c. 4, s. 7 (26) are: 1) Was the data effectively received by the Board of Assessors? 2) Is the consultant a unit of the Board? 3) Is exemption (d) applicable?

Held: **A test focusing on who physically possesses data is not sufficient, for a mere possession test would permit insulation from disclosure. See Ryan v. Dept. of Justice, 617 F.2d 781, 785 (D.C. Cir. 1980). The data sought are equivalent to a record received by the Board. The consultant is a unit of the Board. Revaluation and classification records themselves are not exempt. A record is a public record once it is created, and need not first be approved or adopted by the Board.**

Rationale: The consultant is performing part of the Board's statutory functions under c. 59, s. 38. The criteria as to whether the consultant is a Board unit are: 1) the governmental function performed; 2) the level of governmental funding; 3) the extent of governmental involvement or regulation; and 4) whether the entity was created by the government. Board of Trustees of Woodstock Academy v. FOI Comm'n, 436 A.2d 266, 270-71 (Conn. 1980). G.L. c. 4, s. 7 (26) (d) applies to deliberations and recommendations on legal or policy matters, not to factual data. E.P.A. v. Mink, 410 U.S. 73, 89 (1973); Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Once the data have been collected, the consultant's function is factual and mathematical. The data represent a "reasonably completed factual stud(y)" as described in exemption (d). Revaluation and classification data are essentially the same data as that contained on field assessment cards, which are public. A.G. v. Board of Assessors of Woburn, 375 Mass. 430, 434 (1978).

Determinations

SPR 82/148 **9/23/82**

Issue: An appeal regarding the charge for copies of minutes of CHARMSS, an education collaborative. Is CHARMSS subject to G.L. c. 66, s.10 requirements?

Held: **Yes. CHARMSS is an "agency" (or the functional equivalent) within the meaning of c. 4, s. 7 (26). The charge of 25-cents per page was in excess of the fees permitted under 959 C.M.R. 32.2.5. A refund was ordered.**

Rationale: CHARMSS is an education collaborative established by G.L. c. 40, s. 4E. CHARMSS is also a collection of entities each individually subject to the public records law. In addition, several factors show CHARMSS to be the functional equivalent of an agency: 1) it provides services which could be provided by member school committees; 2) it is completely funded by same; 3) its board of directors is composed of member schools' superintendents; 4) it is regulated by the Mass. Dept. of Education. See Board of Trustees of Woodstock Academy v. FOI Comm'n, 436 A.2d 266, 270-71 (Conn. 1980).

SPR 82/149 **10/7/82**

Issue: Sought from the Dept. of Revenue were: current and recent lists of individual and corporate tax delinquents, their addresses, amounts owed and dates of delinquency. Are the lists statutorily exempt from disclosure under G.L. c. 4, s. 7 (26) (a)?

Held: **G.L. c. 62C, s. 21 (a) exempts most tax return data with specified exceptions. G.L. c. 62C, s. 21 (b) (11) permits disclosure of tax delinquency lists under certain conditions, including where delinquency is in excess of $5,000 and where advance notice of disclosure is given to the delinquent. Diligent search for the records is required. The Dept. of Revenue must secure the approval of the Records Conservation Board before destroying tax records. G.L. c. 30, s. 42.**

SPR 82/154 **9/23/82**

Issue: An advisory opinion was sought regarding records held by the State Boxing Commission Chairman regarding a boxing promoter. Are the records exempt under G.L. c. 4, s. 7 (26) (c) (privacy exemption) or (f) (investigatory exemption)?

Held: **G.L. c. 4, s. 7 (26) exempts from disclosure the applicants' home telephone numbers and physical characteristics as found within applications for a license to conduct boxing matches. G.L. c. 4, s. 7 (26) (f) exempts complainants' names and other identifying information. The content of complainants' letters are public.**

Rationale: There is little public interest in disclosing applicants' telephone numbers and physical characteristics since same does not bear on one's qualifications for a license. Such data are "intimate details" and are within the privacy exemption. A.G. v. Asst. Cmm'r of the Real Property Dept., 1980 Mass. Adv. Sh. 1203. As to (f), investigatory sources

and citizens' willingness to come forward and speak are threatened by disclosure of complainants' identities. Reinstein v. Police Cmm'r of Boston, 378 Mass. 281, 289 (1979); Bougas v. Chief of Police of Lexington, 371 Mass. 59 (1976).

SPR 82/155 10/8/82

Issue: An advisory opinion was sought by a Town Appraiser, Office of the Board of Assessors, regarding a newly adopted public records policy. The policy suggested: 1) that records requests be written; 2) that requesters identify themselves to prevent making records requests in order to harass another; 3) a flat fee of "$1.00 per parcel" for requested records; 4) the fees to be charged for preparing certified abuttors' lists.

Held: 1) Written requests may not be required, except where the record's public status is uncertain. See 950 C.M.R. 32.2.3. 2) But a custodian need not read the requested record over the telephone, and advance payment of costs may be demanded. 3) A flat $1.00 per parcel fee is improper. Fees are limited to 10-cents per copied page, unless the actual cost is greater. The pro-rata hourly wage of the lowest-paid employee qualified to search for the records, if the search takes over 20 minutes, plus postage, may be charged. See 950 C.M.R. 32:00. The fees established represent ceilings, so the maximum need not be charged. 4) Preparing certified abuttors' lists involves creating a new record and certifying same, which actions are outside the scope of the public records law. Thus, the fees established under the public records law are inapplicable here.

SPR 82/156 9/14/82

Issue: Appeal from a fee charged by a school superintendent for records pertaining to non-resident student admissions. Requester alleged that the record copy received was not the record requested. The superintendent refused to process further requests until the outstanding charges were paid.

Held: The record sent meets the description in the request. A more detailed request was suggested if a different record was desired, so the superintendent was entitled to a 10-cent fee for the page that was copied and sent. The superintendent's fee arrangement was a reasonable means of ensuring payment for copies.

SPR 82/167 9/23/82

Issue: A newspaper originally requested from a town retirement board a record of "names, ages and former jobs of the top 10 pension recipients." After the custodian denied the request, the requester appealed. Included in that appeal were requests for additional information regarding the same 10 pensioners' dates of employment and the amounts of their pensions. The SPR ordered disclosure of the information origin-

SPR 82/167 9/23/82 (continued)

ally requested, but declined to address the status under the public records law of the additional requests, since the additional information had not been requested from the custodian. SPR no. 82/95. See G.L. c. 66, s. 10 (b); 950 C.M.R. 32.4.2. The requester then sought records of the employment and pension amounts from the custodian, who argued that the Supervisor's failure to order disclosure of that data in his original determination relieved the custodian from the obligation to disclose it.

Held: **The public interest in pensioners' dates of employment and pension amounts outweighs their privacy interest in non-disclosure, thus the information is not exempt under G.L. c. 4, s. 7 (26) (c). The privacy interest recognized by G.L. c. 214, s. 1B is more limited than that encompassed by exemption (c), so c. 214, s. 1B does not require a custodian to obtain a release from each record subject prior to the disclosure of pensioners' public records.**

Rationale: A balancing of public and private interests is required. A.G. v. Comm'r of the Real Property Dept., 380 Mass. 623 (1980). The public interest in compliance with pension requirements is served by disclosure of pensioners' dates of employment. The minimal privacy interest in these data is evidenced by G.L. c. 7, s. 30, which provides that a state employee's date of employment is public. There can be no greater privacy interest for a town pensioner. As to pension amounts as public records, see Globe Newspaper Co. v. Boston Retirement Board, Suff. Super. Ct. No. 33623 (1981), aff'd, 388 Mass. 427 (1983); cf. Hastings & Sons Pub. Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978) (financial data regarding individual police officers, contained in municipal payroll records, are public).

SPR 82/169 9/24/82

Issue: The SPR declined to intervene in parents' dispute with public school regarding a 25-cents per page copying fee charged for their son's student record. G.L. c. 71, s. 34D gives the State Board of Education the authority to promulgate regulations governing access to and duplication of student records. See 603 C.M.R. 23.07 (2) (a) for fee regulations.

SPR 82/06 4/22/82

Issue: Sought from the Commissioner, Mass. State Police, Dept. of Public Safety: records regarding the death of a man in a town police department lockup. An in camera inspection was made to determine the applicability of the privacy and investigatory exemptions, G.L. c. 4, s. 7 (26) (c) and (f).

Held: **Privacy is a personal right which ends with death. Data regarding public employee's performance of routine duties are not exempt from disclosure. But the lack of a public interest and the potential for embarrassment exempt the name, address, date of birth and social security number of an inmate named in the requested memo who happened to be in the lockup at the time of the other man's death. The remainder of the record is public.**

SPR 82/06 4/22/82 (continued)

Rationale: A balancing of public and private interests is required under s. 7 (26) (c). Exemption (f) is inapplicable. None of the considerations in Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 289 (1979) applies.

SPR 82/14 3/3/82

Issue: Tape recordings of a public meeting of a Town Conservation Commission were sought. The town argued: 1) release of the tapes was against town policy; 2) the tapes were the secretary's personal property and used only to prepare minutes; 3) tapes were not approved or filed with the town clerk; 4) Commission members would have spoken with less candor had they known disclosure of the tapes would occur. Some of the records no longer exist. Some tapes were reused with no transcription except for the parts included in the official minutes.

Held: **Any extant tapes, notes or transcripts are public records. See G.L. c. 4, s. 7 (26).**

Rationale: G.L. c. 39, s. 23B, which permits anyone attending a public meeting to record same, renders the "candor" argument groundless.

SPR 82/31 9/30/82

Issue: An attorney sought from Morton Hospital five hospital policy or procedure manuals and a nursing schedule. The hospital is a private, non-profit corporation, although it is regulated by government agencies. Most of the records sought are required to be kept by law.

Held: **The requested records were not made or received by a governmental entity, within the meaning of G.L. c. 4, s. 7 (26).**

Rationale: See Bello v. South Shore Hospital, 1981 Mass. Adv. Sh. 2411 (despite government funding, licensing and regulation, and tax exemption, hospital is a private institution subject to private control). Even though the Department of Public Health may have a right to receive the requested records, this unexercised right alone does not transform the requested information into records made or received by a government entity. Westinghouse Broadcasting Co. v. Sergeant-at-Arms, 375 Mass. 179, 184 (1978).

Pending Litigation

The only pending litigation that is a result of a public records appeal made to the Supervisor of Public Records is Francis X. Bellotti, Attorney General v. Board of Appeals of the Town of Milton, (Civil Action No. 46208), which has been filed in Suffolk Superior Court.

On July 29, 1980 a request was made to the Milton Board of Appeals for a copy of a June 18, 1980 letter from Town Counsel to the Board. The request was subsequently denied and an appeal was filed with the Supervisor of Public Records for a determination on the public records status of the letter. When the Board refused to submit the document to the Supervisor of Public Records for an in camera inspection, the Attorney General filed suit and on the Attorney General's motion for partial summary judgment pursuant to Mass. R. Civ. P., Rule 56, the court ordered the Board of Appeals to submit a copy of the letter to the Supervisor for an in camera inspection. Once the Supervisor had completed his in camera and determined the letter to be a public record, he ordered the Board of Appeals to disclose the record. The Milton Board of Appeals refused to comply with the Supervisor's order, necessitating the Attorney General to file suit.

At this time, Tony Sager, Assistant Attorney General, has moved for summary judgment, filed a brief and is waiting for the court to schedule a hearing.

Pending Legislation

Several bills have been filed this Legislative Session that would impact on the public records laws, G.L. c. 66, s. 10, and G.L. c. 4, s. 7 (26). H 829, a bill re-filed by Rep. Angelo Marotta, has already passed both the House and Senate and was signed by the Governor on March 28, 1983. This bill amends G.L. c. 66, s. 10 by requiring the clerks of every city and town to post a notice in the city or town hall stating that any citizen is entitled to a copy of a public record for a fee specified in G.L. c. 66. Another bill that is quickly moving through the Legislature is H 4606 filed by Rep. Alfred Saggese, Jr. and Senator George Bachrach. This bill amends section 7 of chapter 78 by making confidential all public library registration or circulation records which reveal the identity of the borrower.

Three other bills that have been filed this session, H 2507, H 3869 and S 1036, would amend the definition of a public record, G.L. c. 4, s. 7 (26), by including an exemption for records compiled in anticipation of litigation or are relevant to pending litigation. H 2507 and S 1036 have been reported out of committee unfavorably and H 3869 has been referred to the Committee on Joint Rules for a study and investigation.

Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427 (1983)

Facts: The Boston Globe requested access to information pertaining to former employees of the City of Boston who were receiving disability pensions. The Boston Retirement Board did not formally respond to the request. As a result, the Globe filed a petition with the Supervisor of Public Records seeking an administrative determination as to whether the information sought was subject to mandatory disclosure pursuant to M.G.L. c. 66, s. 10. The Supervisor ordered the Board to make the information available and the Board refused. The Superior Court then ordered the Board to disclose the information except a cursory statement of the medical reason for granting the disability. The Globe appealed.

Issue: Whether medical files or information are absolutely exempt from disclosure under exemption (c) of M.G.L. c. 4, s. 7 (26).

Holding: Yes.

Rationale: The Supreme Judicial Court reviewing the grammatical construction of the statute and the legislative intent held that the clause, "the disclosure of which may constitute an unwarranted invasion of personal privacy," which requires a balancing of the public interest in disclosure against the privacy interests which may be harmed by disclosure did not modify the phrase "personnel and medical files or information." The Court reasoned that in the case of personnel and medical information the Legislature saw the need to establish a sensitive and particularized balance between the public interest in disclosure and the individual's interest in personal privacy. Therefore the first clause of M.G.L. c. 4, s. 7 (26) (c), operates to absolutely exempt from mandatory disclosure medical and personnel files or information which are of a personal nature and relate to a particular individual.

Connolly v. Bromery, 15 Mass. App. Ct. 661 (1983)

Facts: The appellants, students at the University of Massachusetts at Amherst, sought disclosure of faculty performance evaluations by students pursuant to M.G.L. c. 66, s. 10. This request was denied. The students initiated an action in the Superior Ct. under M.G.L. c. 66, s. 10 (b) to compell disclosure of the records. The Superior Court judge decided that the requested faculty evaluations constituted personnel files or information which is exempt from mandatory disclosure. The students appealed.

Issue: Whether faculty performance evaluations by students constitute personnel information within the meaning of the first clause of exemption (c) to the definintion of public records found at M.G.L. c. 4, s. 7 (26).

Holding: Yes.

Appellate Court Decisions (continued) — **Connolly v. Bromery**

Rationale: The Appeals Court found the holding in Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983) to be controlling. The court concluded that the students' evaluations of individual faculty were records likely to be found in a personnel file and as raw data appraising the job performance of individuals, it was particularly personal and volatile. Accordingly, the court held that the evaluations were personnel information which is outside the category of a public record.

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THE REVIEW

FOIA

Freedom of Information Act

OCTOBER 1983

The Public Records Division of the Massachusetts Secretary of State's office is pleased to provide you with the second issue of *The Review*. A quarterly publication, *The Review* contains summaries of determinations, appellate court decisions and other pertinent information concerning public access to records.

Recent amendments to the public records law, commonly referred to as the state's Freedom of Information Act, make all state and local governmental records available to the public unless specifically exempted by law. They also give the Supervisor of Public Records the authority to issue administrative law determinations concerning such records. *The Review* compiles various appeals and questions brought to the Supervisor, thereby clarifying the terms of the law.

The Public Records Division has also published a series of brochures examining the responsibilities of records requesters and custodians and exemptions of the public records laws, G.L. c.66, s.10 and G.L. c.4, s.7(26), and the Public Access Regulations, 950 C.M.R. 32.00. This information is available in the Public Records Division and is especially useful to records custodians and requesters.

I hope you will retain this issue of *The Review* and add it to the July issue. With this publication we hope to ensure a fair and equitable administration of the public records laws.

James W. Igoe
Supervisor of Public Records

Subject Index

Determinations

SPR 82/217

Issue: Requester appealed the failure of the Division of Insurance to provide him with a copy of a written statement submitted by an individual to an adjuster during the processing of an insurance claim.

Held: The statement is exempt under G.L. c.4, s.7(26) (f).

Rationale: Exemption (f) limits the disclosure of investigatory materials which would prejudice law enforcement. The exemption has been interpreted further to protect the individual citizens who come forward to aid in investigations. Bougas v. Chief of Police of Lexington, 371 Mass. 49 354N.E.2d 872 (1976). Although this rationale pertains to law enforcement, it is also relevant to an investigation of the Division of Insurance. The individual who submitted the statement did so with an expectation that her statement would be confidential. Therefore, she receives the same protection a police witness would be given.

SPR 82/205

Issue: Requester sought an advisory opinion as to whether the public has a right of access to documents and materials relating to matters to be discussed at a public meeting, prior to the meeting and whether such material may be copied and purchased.

Held: As long as the document or a portion thereof is a public record as defined in G.L. c.4, s.7(26), it must be made available for inspection and/or copying within a maximum of ten days after being requested.

SPR 82/187

Issue: The requester appealed the failure of a Redevelopment Authority to provide him with access to development proposals submitted in connection with a redevelopment project.

Held: Access must be granted. Exemptions (g) and (h) of G.L. c.4, s.7(26) do not apply to the requested information.

Rationale: For exemption (g) to be applicable, six criteria must be met; the information must be: 1) trade secrets or commercial or financial information 2) voluntarily provided to an agency 3) for use in developing governmental policy 4) upon promise of confidentiality 5) information not submitted as required by law 6) information not submitted as a condition of receiving a governmental contract or other benefit. Criteria six was not met because proposals were submitted in the hope of being selected as part of the development. Criteria three was also not met because the proposals were submitted in order to acquire a particular piece of real estate not to develop policy.

Exemption (h), which excludes proposals and communication made in connection with evaluations for reviewing bids prior to a decision to award a contract was also considered. The non-disclosure of bid information is restricted to a narrow time period. Considering that a decision had already been reached, and the time period had elapsed, the information was public. Furthermore, the requester specifically excluded from his request agency communications made during the evaluation process. Accordingly, exemption (h) does not apply.

SPR 82/224

Issue: Requester sought an advisory opinion on the public record status of police daily log entries concerning rape or attempted rape.

Held: G.L. c.4, s.97D, operating through exemption (a), exempts police daily log entries concerning incidents of rape or attempted rape from the definition of public records found at G.L. c.4, s.7(26).

Rationale: G.L. c.41, s.98F provides that entries in daily logs shall be public unless otherwise specified by law. G.L. c.4, s.7(26) exemption (a) exempts from the definition of public records data which is exempted by statute. G.L. c.41, s.97D satisfies this exemption requirement in that it explicitly states that reports of rape and attempted rape shall not be public reports and shall be maintained confidentially.

SPR 83/29

Issue: Requester, an attorney, appealed the failure of the Department of Public Welfare to mail him copies of his client's food stamp data.

Held: Although custodians are required to mail records to a requester, food stamp data is not a public record. It is exempt under G.L. c.4, s.7(26) exemption (a) which includes those records exempt by statute. G.L. c.66, s.17A exempts records of the Department of Public Welfare.

SPR 82/219

Issue: Requester appealed the failure of a Board of Selectmen to disclose the names of all the candidates for the post of Executive Secretary of the Selectmen.

Held: The information is exempt under exemption (c) of G.L. c.4, s.7(26) as it relates to personnel data.

Rationale: The clause of exemption (c) which exempts personnel and medical files was interpreted by the Supreme Judicial Court in Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427,438(1983). The court held that medical and personnel files which are of a personal nature and relate to a particular individual are exempt. Regarding the list of candidates for Executive Secretary, the selection and screening process of applicants and applications is integrally related to the personnel process. State v. Hernandez, 556 P.2d.1174,1175 (N.M.1976).

To fall within exemption (c), the personnel information must also be of a personal nature. "Personal" has been interpreted to mean that the information could harm the subject, U.S. Dept. of State v. Washington Post Co., 102 S.Ct. 1957, 1961 and n.4(1982), or that the information was "information which would not normally be shared with strangers." Morrison v. School District 48, Washington County, 631 P.2d.786,789 (Ore. App. 1981) (interpretation of Oregon statute).

The interpretation of an individual as a candidate for the position in question would reveal that the individual is actively pursuing a career change. This is personal information which would not be shared by strangers and is exempt under exemption (c).

Determinations

SPR 82/170

Issue: The requester, an unsuccessful project applicant, sought access to the rating/score sheet kept by the Executive Office of Communities and Development. The rating/score sheet was used to evaluate the applicant's bid for the Innovative Projects Fund.

Held: Public; exemptions (d) and (h) of G.L. c.4, s.7(26) do not apply.

Rationale: Exemption (d), which provides for the withholding of memoranda or letters relating to policy positions being developed by an agency, is inapplicable since the rating/score sheet is the result of completed EOCD policy and therefore cannot be considered part of present policy development. A more appropriate exemption is (h), which excludes "inter-agency or intra-agency communications made in connection with an evaluation process for receiving bids or proposals, prior to a decision to enter into negotiations with or to award a contract to a particular person." This exemption is limited to a narrowly defined time period which ends once a decision has been made to enter into negotiations with, or award a contract to, a particular person. Since EOCD has already awarded the funds, exemption (h) no longer applies.

SPR 83/30

Issue: Requester sought an advisory opinion on the public record status of the names and addresses of all persons required to file a statement of financial interests with the State Ethics Commission.

Held: Public. Exemptions (a), (b) and (c) of G.L. c.4, s.7(26) are not applicable to the information.

Rationale: Exemption (a) includes information that is exempt by statute. The relevant statute, G.L. c.268B, the Financial Disclosure Law, in fact, specifically provides that reports be open for public inspection (subsections 3(d) and 3(e)).

Exemption (b) includes data which is related to personnel files and practices of a governmental unit. The Federal Courts have ruled that this exemption excludes only matters in which the public does not have an interest, Department of the Air Force v. Rose, 425 U.S. 352(1976), and that to fall within the exemption, records must concern truly internal matters that are not of public interest. Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d. 1051 (D.C. Cir. 1981). Since none of the requested records deal with internal procedures that are of no concern to the public, exemption (b) does not apply.

Exemption (c) guards against unwarranted invasion of privacy. A balancing test between the public and private interest was applied. For personal privacy to weigh more heavily, the data must contain "intimate details of a highly personal nature." Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623,626(1980). The privacy interest is not strong. The court has recognized that public employees have less of an expectation of privacy than ordinary citizens. Hastings and Sons Publishing Company v. City Treasurer of Lynn, 374 Mass. 812(1978). Also, the strong public interest is shown by G.L. c.7, s.30, which makes the names and residences of Massachusetts employees statutorily public. Finally, Bougas v. Chief of Police of Lexington, 371 Mass. 59(1976) was cited showing that the public interest in disclosure is the relevant issue, not the issue to which the records will be put by a particular requester.

SPR 83/04

Issue: A custodian sought an advisory opinion as to whether he was required to transcribe a tape of the minutes of a public hearing into a written document.

Held: Neither the public records law, G.L. c.4, s.7(26), nor the Open Meeting Law, G.L. c.39A, s.23B, requires that meeting minutes be first transcribed before access is provided.

Rationale: G.L. c.39A, s.23B states that the records of each meeting shall become a public record while G.L. c.4, s.7(26) specifically names recorded tapes as part of the definition of public records. Therefore the tape recording of the minutes is a public record. The custodian is under no obligation to change the form of the record before providing access.

SPR 82/188

Issue: Requester appealed the failure of a Municipal Treasurer to provide him with a complete list of the municipal area's real estate tax delinquents.

Held: Real estate tax delinquent lists are clearly public records. Attorney General v. Collector of Lynn, 377 Mass. 151,159(1979).

Rationale: The custodian was concerned that this data was outdated and possibly incorrect. However, the public records law does not require a custodian to certify the truth of the record, it merely requires that an existing record be provided upon request for a reasonable fee. G.L. c.66, s.10(a).

SPR 82/204

Issue: Requester appealed the failure of a Municipal assessor to provide him with a list of taxpayers seeking abatements.

Held: Although the abatement applications themselves are exempt under G.L. c.4, s.7(26) by virtue of G.L. c.59, s.60, the list of those accepted for abatement is public under the same statute. Also, a list of those denied abatement without the additional information found in applications constitute a public record.

Rationale: Applications for abatement are exempt from disclosure by G.L. c.59, s.60 operating through exemption (a). However, abatements granted are public records, G.L. c.59, s.60. A list of those denied abatements, without the additional information found in abatement applications, does not fall within exemption (a). G.L. c.4, s.7(26) requires a strict narrow construction of statutes exempting records from public disclosure. Attorney General v. Assistant Commissioner of the Real Property Division of Boston, 380 Mass. 623,626(1980).

Exemption (c) was also considered but was not applicable. In balancing the public interest in disclosure against the possible privacy invasion, it was found that the disclosure of such a list would not constitute an invasion of privacy. Attorney General v. Collector of Lynn, 377 Mass. 151(1979). There is also a strong public interest in the extent to which abatements are granted. Attorney General v. Collector of Lynn, Supra, at 158, and Hobart v. Commissioner of Corporations and Taxation, 311 Mass. 341,349(1942).

Determinations

SPR 82/206

Issue: Requester appealed the failure of the Department of Revenue to provide him with personal data concerning him. Requester sought access under the Fair Information Practices Act (FIPA), G.L. c.66A.

Held: Under 950 C.M.R. 32.30, the authority of the Supervisor of Public Records is limited to hearing appeals of denials by only those offices within the Secretary of State, not including other executive offices. The requester was referred to consult the Executive Office for Administration and Finance. FIPA Regulation 801 C.M.R. 30.

SPR 83/19

Issue: Requester appealed the failure of a Board of Police Commissioners to disclose citizen complaints regarding a Housing Project incident.

Held: G.L. c.4, s.7(26) exemptions (b), (c) and (f) were considered. Exemption (b) was found to be inapplicable. Portions of the complaint that identify the officers involved or the complainant are exempt under (c). Information which identifies complainants or witnesses were found exempt under (f).

Rationale: G.L. c.4, s.7(26) exemption (b) exempts internal rules and practices of a governmental unit, where proper performance requires withholding of this information. This exemption is only applicable where the public does not have a legitimate interest in the data, Department of the Air Force v. Rose, 425 U.S. 352 (1976) and where the data is truly internal or intergovernmental. Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d. 1051(D.C. Cir.1981). Since the requested records do not describe internal administrative procedures that are of no concern to the public, exemption (b) is inapplicable.

Exemption (c), the privacy exemption, contains two clauses. The first clause applies to medical and personnel data of a personal nature. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427(1983). Because a copy of complaints is filed in the police officer's personnel file, the complaints constitute personnel information. "Personal" has been interpreted to mean "information which would not normally be shared by strangers," Morrison v. School District 48, Washington County, 631 P.2d.786(Ore. App.1981) or information which could hurt the subject. United States Department of State v. Washington Post Co., 102 S.Ct. 1957,1961 and n.4(1982). The Massachusetts Supreme Judicial Court has ruled that the identities of police officers who discharged firearms fall within exemption (c) in that the officer would suffer an invasion of privacy. Reinstein v. Police Commissioner of Boston, 378 Mass. 281(1979). Since this information is not the type that would be shared with strangers and its disclosure could harm the subject, the segment of the report which identifies the officers is exempt under exemption (c). Considering the second clause, SPR 610 was cited in the determination that the social security numbers of the complainants are exempt under exemption (c).

Finally, exemption (f), the investigatory exemption, was considered. One of its purposes is to encourage citizens to come forward and speak willingly with law enforcement officials. Bougas v. Chief of Police of Lexington, 371 Mass. 59,62 (1976). Therefore, any information which reveals the identities of the witnesses or complainants of the incident are exempt under (f). The actual content of the complaints, without identification of individuals, contain no data which would affect law enforcement and is therefore public.

SPR 82/196

Issue: Requester, a member of a Municipal Board of Assessors, sought an advisory opinion to clarify the requirements of the public records law, G.L. c.66, s.10, as they apply to records held by a Board of Assessors.

Held: Field assessment cards are public records. Attorney General v. Board of Assessors of Woburn, 375 Mass. 430(1978). Any person, regardless of his motivation, has access to public records. Bougas v. Chief of Police of Lexington, 371 Mass. 59,64(1976). G.L. c.66, s.10 does not allow a record custodian to impose limits on the number of records which may be examined, Direct Mail Service v. Registry of Motor Vehicles, 296 Mass. 353,356(1937), although a requester may not freely puruse a custodian's files without permission. It was also noted that Regulation 2.5 of 950 C.M.R. 32.00 clarifies what a "reasonable fee" may be. The custodian is under no obligation to create a record upon request, and according to G.L. c.66, s.10(a), it was decided that access to public records should be available during office hours, and not exclusively on a specific day of the week.

SPR 83/22

Issue: Requester appealed the failure of a Board of Selectmen to provide a copy of an audit report.

Held: Public: G.L. c.66, s.17B made audit reports public.

Rationale: Prior to 1973, a public record was either a record required to be made by law or a record specifically public by statute. Although G.L. c.66, s.17B was repealed with the enactment of G.L. c.4, s.7(26), records which were public prior to this enactment remain public. St.1973, 1050, s.6 and Hastings and Sons v. City Treasurer of Lynn, 374 Mass. 812,186(1978). Therefore, audit reports, which were public records prior to 1973, remain public records under the current definition found at G.L. c.4, s.7(26).

SPR 83/47

Issue: Requester sought an advisory opinion on the public record status of a Municipal Board of Selectmen's employee performance review of the Executive Secretary.

Held: The employee performance review is personnel information of a personal nature, Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427,438 (1983) and is exempt under G.L. c.4, s.7(26) exemption (c).

Rationale: The court's standard in Globe depends on the information being both personnel and personal. In Department of the Air Force v. Rose, 425 U.S. 352(1976), the United States Supreme Court held that an evaluation of work performance is personnel information. As to whether this information is personal, a Louisiana case, Trahan v. Larivee, 365 So.2d.294,300(La.1978), held that evaluations of government heads are "very personal". It was also noted that Federal courts have looked to whether disclosure could harm an individual in deciding whether information is personal. U.S. Department of State v. Washington Post Co., 102 S.Ct. 1957(1982) and Vaughn v. Rosen, 383 F.Supp.1049,1055(D.D.C.1974). It was determined that these records could harm the evaluation subject, if disclosed.

Determinations

SPR 83/28

Issue: Requester sought access to a police officer's motor vehicle accident report.

Held: The report is public. Disclosure of record would not frustrate effective law enforcement therefore exemption (f) of G.L. c.4, s.7(26) does not apply.

Rationale: While exemption (f) does include investigatory materials of law enforcement officials, a case by case evaluation is needed since only materials which prejudice the possibility of effective law enforcement are exempt. Reinstein v. Police Commissioner of Boston, 378 Mass. 281,289(1979).

The requester had already received two forms containing all the data from the officer's accident supplement with the exception of data concerning the towing of cars. Neither information on the towing of cars nor information which had already been disclosed would hamper an investigation.

SPR 83/24

Issue: Requester appealed the fifty cents per page fee the city of Boston charges for providing a copy of a public record. The fee was set by Boston Ordinance, Title 14, s.450 (267) 1982 which is based on St.1949, c.222, "an act Empowering the City of Boston to Fix by Ordinance Certain Fees and Charges." At issue was whether St.1949, c.222 exempts Boston from the general public records fee regulations.

Held: The City of Boston is not empowered by St.1949, c.222 to set the fifty cents per page fee for copying. Instead, it is governed by G.L. c.66, s.10 and 950 C.M.R. 32:2.5.

Rationale: G.L. c.66, s.1 and 950 C.M.R. 32:2.5 set fees "except where fees for copies are prescribed by law." Also, section 2 of Chapter 222 states that no law subsequently passed may affect Chapter 222 without an explicit directive to that effect. The Supervisor of Public Records rejected the City of Boston's argument that since G.L. c.66, s.10 does not refer to Chapter 222, the Boston Ordinance governs the fees that may be charged.

Chapter 222 authorizes two categories of fees and charges. The first deals with fees and licenses and has nothing to do with public records. The second category covers charges to be paid for services, provided that they are not part of the general services furnished for the benefit of the citizens.

The disclosure of public records benefits the citizens and is therefore governed not by Chapter 222 but by G.L. c.66, s.10. The purpose of the public records law is to open the workings of government to general scrutiny rather than to benefit individual interests. E.P.A. v. Mink, 410 U.S. 73,110(1973). This service to the public is reflected in the Massachusetts Supreme Judicial Court ruling that anyone has standing to invoke the public records law. Bougas v. Chief of Police of Lexington, 371 Mass. 59(1976). Furthermore, the purpose of the Freedom of Information Act is to insure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. NLRB v. Robins Tire Company, 437 U.S. 214,242(1978).

It should be noted that new fees went into effect July 1, 1983.

SPR 82/225

Issue: Requester appealed the failure of the Registry of Motor Vehicles to provide access to all documents concerning an individual's 1969 motor vehicle accident.

Held: The documents are public with the exception of the information which falls under the Criminal Offender Record Information Act. This information is exempt by statute.

Rationale: G.L. c.6, s.172, the Criminal Offender Record Information Act, limits the disclosure of data relating to criminal acts which carry the possibility of incarceration as well as information which concerns an identifiable individual and a criminal charge. The Criminal Offender Record Information Act operates through exemption (a) of G.L. c.4, s.7(26).

SPR 82/221

Issue: The requester, a clerk of a retirement system, sought an advisory opinion regarding the fees that may be charged for editing and copying minutes of meetings of the Retirement Board.

Held: 950 C.M.R. 32 specified the fee of ten cents per page. Where the cost of production is greater, twenty cents a page may be charged with a provision that a reasonable additional fee may be charged for duties beyond standard office procedures. No editing fee may be passed on to the requester, since the records are public in any form. It should be noted, however, that under the new regulations, effective July 1, 1983, the fee for photocopies shall not exceed twenty cents per page.

SPR 82/174 and SPR 82/183

Issue: An opinion was sought on the public records statute relating to the death of a particular man while in the custody of a Municipal Police Department. The records consisted of statements from the police officers involved and a report of the State Police.

Held: Exemptions (c) and (f) of G.L. c.4, s.7(26) do not apply and the records are public. However, that portion of the report which identifies a different person than the deceased being taken into custody shall not be disclosed.

Rationale: Exemption (c) which guards against unwarranted invasion of privacy was found to be inapplicable using the balancing test of private versus public interest. Attorney General v. Assistant Commissioner of Real Property of Boston, 380 Mass 623,626(1980). The right to privacy is a personal right that terminates at death. Therefore, the report concerning the particular person who died in custody does not constitute an invasion of privacy. However, the segment of the report which identifies a certain person other than the deceased as being taken into custody is applicable under exemption (c) in that it invades personal privacy without securing any public interest. Exemption (f) is not applicable in that disclosure of the report would not hamper investigation activities. See Reinstein v. Police Commissioner of Boston, 378 Mass. 281(1979) and Bougas v. Chief of Police of Lexington, 371 Mass. 59,62(1976).

Determinations

SPR 82/172

Issue: A police department sought an advisory opinion as to whether photographs of on-duty police officers were public records, G.L. c.4, s.7(26) (c).

Held: The public's interest in disclosure of the photographs of the police officers outweighs the individual's privacy interest.

Rationale: Exemption (c) requires a balancing test of the public's interest versus the privacy rights of the individual to determine if information may be disclosed. Since a police officer must be visible to his municipality by necessity and since only a minimal invasion of privacy would occur, the public interest is far greater. The public interest in this case is in fact very strong. Cited were G.L. c.41, s.98D which requires that police officers carry and exhibit upon request photo ID's for the purpose of public awareness of police officers, and Hastings and Sons Publishing Company v. City Treasurers of Lynn, in which the Massachusetts Supreme Judicial Court ruled that police officers have less of an expectation of privacy than ordinary citizens.

SPR 82/216

Issue: Requester appealed the failure of a Housing Authority to provide her with copies of Housing Authority meetings' minutes and the Ledger Book Waiting List.

Held: The record custodian must provide access to records which exist, but is under no obligation to create a record, G.L. c.66, s.10. Therefore, the custodian is not required to produce minutes which do not exist.

Although the ledger book may be inaccurate, it does not fall under any of the exemptions of G.L. c.4, s.7(26) and is therefore a public record.

SPR 82/198

Issue: The requester appealed the failure of the Division of Personnel Administration to provide access to the entire text of a letter made by a doctor discussing the division's medical standard for correctional officers.

Held: Those sections of the letter which make specific recommendations for improving the division's medical standards for correctional officers are exempt under exemption (d) of G.L. c.4, s.7(26). The remainder is public and must be disclosed under G.L. c.6, s.10(a).

Rationale: Exemption (d) includes memoranda relating to policy positions being developed by the agency. It does not include completed factual data. Information which comprises part of the deliberative process is exempt and any document which makes recommendations on legal and policy matters is part of this process. Vaughn v. Rosen, 523 F.2d. 1136,1144 (D.C. Cir. 1975). Therefore, the section of the letter which makes recommendations on improving medical standards forms part of the deliberative process and is accordingly exempt under (d) of G.L. c.4, s.7(26), while sections containing purely factual material are not exempt.

SPR 83/27

Issue: Requester appealed the failure of a Municipal Police Department to provide access to the daily police log and a list of the police officer's names, positions and badge numbers.

Held: The log is a public record under G.L. c.41, s.98F. The list of names, positions and badge numbers does not fall under exemption (c) of G.L. c.4, s.7(26) and is therefore public as well.

Rationale: G.L. c.41, s.98F provides that daily logs shall be a public record. Furthermore, the only charge which may be passed on to the requester is the copying charge.

Exemption (c) of G.L. c.4, s.7(26) was considered in relation to the list of names, positions and badge numbers. The Supreme Judicial Court has ruled that personnel and medical files of a personal nature are exempt from disclosure. Globe v. Boston Retirement Board, 388 Mass. 427,438(1983). This list does contain personnel data, but it is not of a personal nature. Names and salaries of municipal employees, including policemen, are not exempted. Hastings and Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812,818(1978). Also, G.L. c.7, s.30 provides that the names, residences and salaries of state officials shall be available for public inspection. Furthermore, G.L. c.31, s.98C and s.98D require that police officers identify themselves with badge and identification cards. Therefore, the information is not personal.

SPR 82/171

Issue: Requester appealed the refusal of a Municipal Police Department to permit access to a police motor vehicle accident report.

Held: The accident report was determined to be a public record with the exception of that part of the record which cites violations that fall under the Criminal Offender Information Act, G.L. c.6, ss.167-176 et.seq.

Rationale: Under the Grandfather provision of St. 1973 c.1050, s.6, anything that was a public record prior to 1973 remains a public record. This operates to make the majority of the police motor vehicle accident report a public record. The police report is required to be filed by G.L. c.90, s.27 with the Registrar of Motor Vehicles and as such was a public record under the pre-1973 definition of public records, St. 1969 c.831, s.2. However, the section of the report dealing with violations must be considered separately. The Criminal Offender Record Information Act (CORI), G.L. c.6, s.176, limits the dissemination of "data in any communicable form compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge... . Criminal offender record information shall not include any information concerning any offenses which are not punishable by incarceration." Accordingly, data which describes offenses the violation of which could lead to incarceration was not public when Chapter 1050 was enacted and therefore falls within exemption (a).

Determinations

SPR 82/176

Issue: Requester, a campaign director for a congressional candidate, appealed a town clerk's failure to provide him with a computer disc containing the town's registered voter information.

Held: The clerk must comply with the request for registered voter information. It constitutes a public record, under G.L. c.51, s.55, in its computerized form.

Rationale: Registered voter information is a public record under G.L. c.51, s.55, and public records include all data "regardless of physical form or characteristics." G.L. c.4, s.7(26). Therefore the change in form does not change the status of the data which is made public by statute. Kurzon v. Department of Health and Human Services, 649 F.2d.65, 68n.2(1st Cir. 1981), and Columbia Packing Inc. v. U.S. Department of Agriculture, 563 F.2d 495(1st Cir. 1977), were cited to point out that a possible commercial use of a public record does not bar its disclosure under G.L. c.66, s.10. The clerk's claim of budgetary problems was dismissed due to the fact that he may charge a "reasonable fee" for the record according to G.L. c.66, s.10(a).

SPR 82/99

Issue: Requester appealed the failure of a Municipal Police Department to provide access to a police investigation report concerning juveniles.

Held: Portions of the report which identify individuals are exempt under G.L. c.4 s.7(26) exemption (c), the privacy exemption. All other portions are public. Exemption (f), the investigatory exemption, was considered and found inapplicable.

Rationale: Exemption (c) requires the use of a balancing test between the public and private interest. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623,626(1980). G.L. c.119, s.60(a) provides that juvenile court records be closed to the public. G.L. c.120, s.21 provides that the records of the Department of Youth Services be similarly closed. Although these statutes do not deal with police logs, the Supreme Judicial Court has "recognized that it was the intent of the legislature to provide broadly for the confidentiality of Juvenile records." Police Commissioner of Boston v. Municipal Court of the Dorchester District, 374 Mass. 640,651(1978). Therefore, identifying information in the logs is exempt under (c). Exemption (f), which exempts information such as confidential investigatory techniques, was found to be inapplicable since the investigation consisted of a straight factual account and was now closed.

Attorney General v. Collector of Lynn
377 Mass. 151 (1979)

Facts: Members of Lynn Fair Share requested a list of owners of real property in Lynn who were delinquent in the payment of their real estate taxes. The requested list included the names of the owners of real estate, addresses or descriptions of the parcels, and the total amounts of unpaid taxes in respect to each parcel. The collector of Lynn stated that the records were not available to the public and therefore denied the request. Members of Lynn Fair Share filed a petition with the Supervisor of Public Records, requesting a ruling pursuant to G.L. c.66, s.10(b) that the delinquent property tax records are public records. The Supervisor issued a determination that the information requested is public and ordered the Collector of Lynn to make it available for public inspection. The collector did not comply with this order. The Supervisor informed the Attorney General of the collector's failure to comply. The Attorney General brought suit in Superior Court. The judge ruled that records of tax delinquents were exempted from the definition of public records specifically and by necessary implication of G.L. c.60, s.8, through the operation of G.L. c.4, s.7(26)(a). The judge also ruled that these records were exempt from disclosure by exemption (c) because disclosure would constitute an invasion of privacy.

Issue: Whether records of tax delinquents are exempted from disclosure by G.L. c.4, s.7(26)(a) and/or (c).

Held: No.

Rationale: G.L. c.60, s.8 provides that the records of a collector shall be open to inspection by the town auditor at all reasonable times, and to other named town officials on demand. This provision does not create an exclusive list of those who may inspect a collector's records. It creates an expedited inspection process for officials to gain access to these records, recognizing the need for such officials to have the information. On the other hand, G.L. c.66, s.10, the public records law, gives the public the right to inspect these records. These rights are complementary rather than conflicting. Therefore, G.L. c.60, s.8 does not specifically or by necessary implication exempt these records from disclosure under exemption (a) of G.L. c.4, s.7(26).

As to exemption (c), it requires a balancing between the seriousness of any privacy invasion and the public right to know. Hastings and Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812,818-819 (1978). The privacy exemption may be applied only when the privacy interest outweighs the public interest in disclosure. Although public disclosure of such lists does involve some invasion of privacy, the public's right to know should prevail unless disclosure would publicize "intimate" details of a "highly personal nature." The records of tax delinquents do not constitute intimate details of a highly personal nature. Furthermore, the public has a strong interest in whether public employees are collecting delinquent accounts and whether the burden of public expenses is being distributed equitably. This strong public interest outweighs any invasion of privacy caused by the disclosure of these records.

Attorney General v. Assistant Commissioner of the Real Property of Boston
380 Mass. 623 (1980)

Facts: An employee of a Boston television station requested access to a record of all long distance telephone calls from or charged to any telephones in the offices of the Mayor of the City of Boston during the month of February, 1977. The requested information included the date, time, place called, area code, telephone number, length of time and cost of each long distance call. The assistant commissioner of real property of the city of Boston denied the request. As a result, the requester filed a petition with the Supervisor of Public Records seeking an administrative determination as to whether the information sought was subject to mandatory disclosure pursuant to G.L. c.66, s.10. The Supervisor issued a determination that the information requested is public and ordered the assistant commissioner to make it available. The assistant commissioner did not comply with the Supervisor's order. The Supervisor referred the matter to the Attorney General who brought suit in Superior Court. The Superior Court ordered the assistant commissioner to disclose only that portion of the record containing information on the date, length of time and cost of each long distance call. The judge specifically excluded from disclosure the area codes and telephone numbers of persons engaged in such long distance calls. The Attorney General appealed this portion of the judgment.

Issue: Whether records of the area codes and telephone numbers of persons engaged in long distance telephone calls charged to phones in the office of the Mayor of the City of Boston are public records.

Held: The Court ruled that whether this information is public or not is an issue of fact and therefore it remanded the case to the Superior Court for a factual determination of this issue.

Rationale: In order to determine whether a record falls within exemption (c) of G.L. c.4, s.7(26), the public's right to know must be balanced against the privacy interest which may be harmed by disclosure. Hastings and Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812,817 n.8 (1978). Since the public records law favors disclosure, the exemptions must be strictly construed. Attorney General v. Assessors of Woburn, 375 Mass. 430 (1978). The public right to know should prevail unless disclosure would publicize intimate details of a highly personal nature. Attorney General v. Collector of Lynn, 377 Mass. 151,157 (1979). The Court cited the following as examples of intimate details: "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights [and] reputation."

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SPR 82/179

Issue: Requester sought an advisory opinion as to whether correspondence between a district attorney and a former employee's attorney relating to an employment dispute were public records.

Held: Two of the letters are public records. The remaining seven letters are not public records by virtue of exemption (c) and therefore are not subject to mandatory disclosure.

Rationale: The subject matter of the letters was an alleged employment incident concerning remarks made about the former employee. Two of the letters relate to how the former employee's salary schedule was derived from the position classification and related legislative background. The remaining letters concern the substance of the dispute and the negotiations made in an attempt to settle the dispute.

Exemption (c), the privacy exemption, requires a balancing of the public interest in disclosure against the seriousness of the individual's invasion of privacy. In order for exemption (c) to be applicable, the seriousness of the individual's privacy invasion must outweigh the public interest in disclosure. In *Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 626 (1980)*, it was held that the "public right to know should prevail unless disclosure would publicize 'intimate details' of a highly personal nature." Although the public has a strong interest in the employment practices of a government entity, this interest is outweighed by the strong privacy interests in the information sought. Disclosure of the letters, with the exception of the two concerning salary, could tarnish the former employee's reputation and adversely affect his or her opportunities for future employment. Therefore, the two letters concerning salary are public records and must be disclosed upon request. The remaining letters are exempt from the mandatory disclosure provisions by exemption (c).

SPR 83/78

Issue: What is the fee that a municipal police department may charge for furnishing, in hand, a copy of a motor vehicle accident report?

Held: Pursuant to G.L. c.66, s.10(a), if the report is delivered in hand, the fee can be no more than fifty cents per page.

Rationale: G.L. c.66, s.10(a) as amended by St. 1982, c.477 provides that a police department may charge $5.00 for the first six pages and fifty cents for each additional page when preparing and mailing a motor vehicle accident report. It further provides that the police department may charge fifty cents per page for furnishing any public record in hand. The law draws a distinction between specified police reports which require preparation and mailing and any public record which is furnished in hand. The appropriate fee is determined by ascertaining what kind of police record is being requested and the method of delivery. The five dollar fee for motor vehicle accident reports would not apply to an accident report furnished in hand. The fee of fifty cents per page would apply to a motor vehicle accident report where the method of delivery is by hand.

SPR 82/94

Issue: Requester sought an advisory opinion on the public record status of town census information maintained by a computer company in tape and printout formats.

Held: The computer form of the records is irrelevant to their public record status, G.L. c.4, s.7(26). All sections of the census were found to be public by statute with the exception of a yes or no query relating to the identification of the head of the household, which fell under exemption (c) of G.L. c.4, s.7(26).

Rationale: The following census information was found to be public by statute: names, addresses, dates of birth, occupations, nationalities, (G.L. c.51, ss.4, 6 and 7), political party affiliations and precinct numbers, (G.L. c.51, s.55), school attendance of residents under 21, (G.L. c.51, s.4).

In regard to whether the question concerning the resident's status as the head of the household fell under exemption (c), a balancing test was applied. This test weighs the public interest in disclosure against the individual's interest in privacy. In *Wine Hobby USA, Inc. v. U.S. Internal Revenue Service, 502 F. 2d. 133, 137 (3rd. Cir. 1974)*, the federal privacy exemption was cited, pointing out that disclosure of information concerning "the home and private activities within it" constitutes an invasion of privacy.

Therefore, since there was little public interest in this information and because disclosure would publicize "intimate details of a highly personal nature", exemption (c) applied to the data concerning head of household status. *Attorney General v. Collector of Lynn, 377 Mass. 151, 157 (1979).*

SPR 83/90

Issue: Requester appealed the failure of a Municipal Police Department to provide access to a copy of the Department of Public Works gasoline usage investigatory report.

Held: The report is public. G.L. c.4, s.7(26) exemptions (c) and (f) are not applicable.

Rationale: The application of exemption (c) requires the use of a balancing test weighing the public's right to know against the individual's interest in privacy. The information contained in the report was not found to be "an intimate detail of a highly personal nature" and did not, therefore, outweigh the public interest in disclosure. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623 (1980).*

Exemption (f), the investigatory exemption, was also considered. It provides protection for those law enforcement activities requiring a cloak of confidentiality to succeed. Since no law enforcement activity was planned, there is no possibility that disclosure would prejudice the Commonwealth's case. Disclosure would not reveal any confidential sources of information, investigative techniques or procedures. Finally, since it makes only broad findings and fails to make conclusions, disclosure would not inhibit police officers from candidly recording their observations, hypotheses, and conclusions. See *Reinstein v. Police Commissioner of Boston, 378 Mass. 282, 289 (1979)* citing *Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976).*

SPR 83/96 and SPR 83/115

Issue: Requester sought access to two tape recorded telephone conversations by a municipal police department.

Held: Requester was granted access to the recording which was still in existence. However, since the other recording was no longer in existence at the time of the request, the public records law was inapplicable.

Rationale: Pursuant to G.L. c.66, s.10, a custodian is required to provide access to records that exist at the time of the request. Therefore, access to the tape recording which does exist must be granted. However, the custodian is under no obligation to produce a record no longer in existence. Also, a reasonable fee may be charged for isolating the pertinent section of the existing tape. G.L. c.66, s.10. This fee, however, must be in accordance with 950 C.M.R. 32.00.

SPR 83/134

Issue: Requester sought an advisory opinion concerning the public record status of the educational qualifications and certification of specific teachers within a public school system.

Held: The data concerning teacher certification and educational qualifications, such as college majors, colleges attended and degrees awarded, is not within the confines of exemption (c).

Rationale: Exemption (c) contains two distinct and independent clauses. *Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983).* In applying the first clause of the exemption, a three-pronged test must be used. In *Globe*, the court found that in order to fall within the confines of the first clause of exemption (c), information must be personnel information of a personal nature, and must relate to a specific individual. The first and third requirements were easily met. The educational qualifications and teacher certifications are ordinarily found in personnel files and relate to a specific individual.

In determining whether the records are of "a personal nature", a number of cases were examined interpreting this phrase. In *Morrison v. School District 48, Washington County, 631 P. 2d. 786 (Ore. App. 1981)* "information of a personal nature" was interpreted to mean that which normally would not be shared with strangers. Further, where a hospital requested records concerning the educational, training and experience information of a state agency employed physician auditor, the court said that such information is "routinely presented in both professional and social settings, is relatively innocuous, and implicates no applicable privacy or public policy exemption." *Eskaton Monterey Hospital v. Myers, 184 Cal. Rptr. 840, 843 (Cal. 1982).* Further, as public employees, teachers in public schools have less of an expectation of privacy in their professional credentials.

Accordingly, data concerning the certification and educational qualifications, such as college major, colleges attended and degrees awarded, of public school teachers does not fall within the confines of exemption (c), and is therefore subject to disclosure pursuant to G.L. c.66, s.10.

SPR 83/40

Issue: A custodian sought an advisory opinion on the public record status of the names of persons who recommended the summer youth employees hired by state agencies.

Held: The names of references for summer employees employed by state agencies are exempt from disclosure by G.L. c.4, s.7(26)(c).

Rationale: The first clause of exemption (c) has been held to exempt medical and personnel files or information which are of a personal nature and relate to a particular individual. *Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438 (1983).* Since the names of references for an employee are ordinarily found in a personnel file and the records relate to specific individuals, the remaining question under *Globe, supra,* is whether the records are of a "personal nature." Personal has been interpreted to mean that the information has the potential to harm the subject. See *United States Department of State v. Washington Post Co., 102 S. Ct. 1957, 1961 and n.4 (1982).* It has also been interpreted to mean "information which would not normally be shared with strangers." *Morrison v. School District 48, Washington County, 631 P. 2d. 786, 789 (Ore. App. 1981)* (interpretation of Oregon statute). It is possible that disclosure of this information would be harmful. Disclosure of the fact that a summer employee was recommended by a particular person may promote envy or jealousy from co-workers. Disclosure might also inhibit people from lending their names as references in the future. This information is not widely disseminated, nor is it information that a person would voluntarily disclose. Therefore, the names of references for summer employees employed by state agencies are exempt from disclosure by G.L. c.4, s.7(26)(c).

SPR 83/92

Issue: The requester sought an advisory opinion on whether a police officer may obtain the numerical passing score he or she received on an examination administered by the Massachusetts Criminal Justice Training Council.

Held: Yes. Exemption (c) does not preclude a person from obtaining records which pertain to him or her personally.

Rationale: In *Crooker v. Foley, No. 33785 (Suffolk Sup. Ct. Feb. 28, 1980),* the Massachusetts Superior Court held that the personal privacy exemption does not preclude a person from viewing records which pertain to him personally. The Federal Courts have reached a similar conclusion in applying the privacy exemption to the analagous federal Freedom of Information Act, 5 U.S.C. s.552(b)(6). In *Nix v. United States, 572 F. 2d. 998, 1006 (4th Cir. 1978)* the court stated that since "the medical record in question ... is that of the very individual who seeks its disclosure" there is no invasion of privacy and subsection 6 (the Federal privacy exemption) is inapplicable. Since exemption (c) does not bar a person from gaining access to his or her own records, the records must be disclosed to the requester pursuant to G.L. c.66, s.10(a).

SPR 83/50

Issue: Requester sought a determination as to whether the record of the Massachusetts Parole Board's vote to schedule a hearing on the commutation petition of a particular individual is a public record.

Held: No. The record sought is Criminal Offender Record Information (CORI) and as such is exempt from disclosure by exemption (a) of G.L. c.4, s.7(26).

Rationale: Exemption (a), which excludes records that are exempt by statute, is applicable. G.L. c.6, s.167 defines Criminal Offender Record Information (CORI) as all records or data compiled by a criminal justice agency, which relate to an identifiable individual and relate to the nature or disposition of a criminal proceeding. G.L. c.6, s.172 prohibits the unauthorized disclosure and dissemination of CORI. The vote of the Parole Board concerning whether or not to have a hearing meets the statutory definition of CORI and therefore is exempt from disclosure under exemption (a).

SPR 83/84

Issue: Requester, a director of an educational collaborative, sought an advisory opinion on the public record status of a draft analysis regarding access to confidential student information, a letter from an attorney, and a related memorandum.

Held: Segments of the draft analysis are exempt under G.L. c.4, s.7(26) exemption (d). The remaining data does not fall within exemption (d), nor any other exemption and is therefore public.

Rationale: Exemption (d) provides a limited executive privilege for data relating to the development of government policy. To be included as part of the exempted deliberative process, the data must make recommendations or express opinions on legal or policy matters. *Vaughn v. Rosen, 523 F. 2d. 1136, 1144 (D.C. Cir. 1975).* Its application is limited to those matters in which the author has a reasonable expectation of confidentiality, without which he or she would be unwilling to express ideas fully and completely. Exemption (d) thus covers the personal opinions of the writer rather than the policy of the agency. *Coastal States Gas Corp. v. Department of Energy, 617 F. 2d. 854, 866 (D.C. Cir. 1980).*

The draft analysis is essentially a factual analysis. However, there are sections which contain expressions of the author's opinion which fall within exemption (d). The remainder of the draft analysis is factual and is therefore public, regardless of the fact that it is placed in memorandum form along with policy matters. *Environmental Protection Agency v. Mink, 410 U.S. 73, 91; 93 S. Ct. 827 (1973).* Also, inferences drawn from factual information are not exempt. *Moore McCormick Lines Inc. v. L.T.O. Corp. of Baltimore, 508 F. 2d. 945, 949 (4th Cir. 1974).* As the observations in the analysis are not so candid and personal in nature that disclosure would stifle communication in the future, they do not fall within exemption (d).

The letter to the attorney contains an expert explanation of the law. Such explanations do not fall within any of the exemptions. Finally, the memorandum made no recommendation and was therefore not exempt under (d) or any other exemption.

SPR 83/135

Issue: A custodian sought an advisory opinion on the public record status of the personnel records of teachers, supervisors, administrators and other public school employees. Specifically, the personnel records consist of the following: college transcripts, evaluations, salary agreements, commendations, and reprimands.

Held: Evaluations, reprimands, commendations, and transcripts of school department employees are exempt from disclosure by G.L. c.4, s.7(26)(c). Salary information, however, does not fall within exemption (c) and therefore is public.

Rationale: The first clause of exemption (c) exempts medical and personnel files or information which is of a personal nature and relates to a particular individual. *Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438 (1983).* Personnel information which is evaluative has been held to fall within the privacy exemption by both state and federal courts. See *Department of the Air Force v. Rose, 425 U.S. 352 (1976); Vaughn v. Rosen, 383 F. Supp. 1049 (D.D.C. 1974);* and *Connolly v. Bromery, 15 Mass. App. Ct. 661 (1983).* Accordingly, evaluative personnel records are personal and therefore fall within exemption (c).

The commendations and reprimands were found to be evaluative in nature and therefore exempt from disclosure pursuant to exemption (c) to the extent that they include grades, as grades are evaluative in nature. Salary agreements, however, do not fall within exemption (c). In *Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812 (1978)* the Supreme Judicial Court held that salary information of public employees was not sufficiently private to justify non-disclosure. Therefore, salary agreements constitute public records and must be disclosed upon request pursuant to G.L. c.66, s.10(a).

SPR 82/107

Issue: Requester appealed the Insurance Division's failure to provide access to non-investigatory out-of-state travel vouchers.

Held: The records are public. G.L. c.4, s.7(26) exemption (c), the privacy exemption, and exemption (f), the investigatory exemption, were both found inapplicable.

Rationale: In this case, exemptions (c) and (f) were considered. When applying exemption (c), a balancing test must be used weighing the public's right to know against the individual's interest in privacy. Only if the privacy invasion outweighs the public's interest may the requested record be withheld. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623 (1980).* Applying exemption (c) to the controverted documents, the only information in which the individual's interest outweighs that of the public is the employee's social security number, in which there is a significant privacy interest. Further, the Fair Information Practices Act may prohibit a custodian from disclosing social security numbers.

Regarding the investigatory exemption, the forms the requester seeks offer no available space for investigatory remarks. Exemption (f) is therefore inapplicable.

SPR 83/61

Issue: Requester appealed the failure of a Municipal Police Department to grant access to those portions of the daily police log which reveal the identities of persons arrested for "lewd and lascivious behavior" and "unnatural acts".

Held: Public. The information in the police logs does not fall under exemption (c) of G.L. c.4, s.7(26), the privacy exemption.

Rationale: The balancing test between the public and private interest was applied. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623 (1980).*

The public's strong interest in knowing the identity of those arrested was reflected in St.1977, c.841, which exempted chronologically maintained police logs from the confidentiality provisions of the Criminal Offender Record Information Act, G.L. c.6, ss.167-178. Also, G.L. c.41, s.98F requires that a log be kept as a public record. Federal Courts have ruled that the public has a legitimate interest concerning arrested persons, *Tennessean Newspaper Inc. v. Levi, 403 F. Supp. 1318 (M.D. Tenn. 1975),* and that a state is not prohibited from publicizing an official act such as an arrest. *Paul v. Davis, 424 U.S. 693, 713 (1976).*

The private interest in embarrassment was not a strong enough factor when weighed against the public interest in disclosure.

SPR 83/48

Issue: Requester sought an advisory opinion on the public record status of the list of names of applicants for the position of Director of a municipal Department of Public Works.

Held: The list is exempt from disclosure under G.L. c.4, s.7(26) exemption (c), the privacy exemption.

Rationale: Exemption (c) contains two distinct and independent clauses. *Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983).* In the *Globe* case, the Court held that "medical and personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." *388 Mass. at 438.* In order for the requester's data to be exempt under exemption (c), it must meet each of the criteria outlined in *Globe.*

In *State v. Hernandez, 556 P. 2d. 1174 (N.M. 1976),* the court found the selection and screening of applicants to be integrally related to the personnel process. "Information of a personal nature" has been interpreted to mean information that would not normally be shared with strangers. See *Morrison v. School District 48, Washington County, 631 P. 2d. 786, 789 (Ore. App. 1981)* (interpretation of Oregon statute). It was noted that the identification of an individual as an applicant for the position of Director of Public Works reveals that the person is actually pursuing a career change. It was determined that such information is of a personal nature, relates to a particular individual and is within the meaning of personnel information. Accordingly, the requested information was found to fall within the confines of exemption (c).

SPR 83/89

Issue: Requester sought an advisory opinion on the public record status of a grievance petition submitted to a Board of Selectmen from a collective bargaining unit.

Held: Neither G.L. c.150E, s.7(d) nor ss.8 and 10 operate through G.L. c.4, s.7(26)(a) to exempt grievance petitions from public disclosure.

Rationale: Exemption (a) includes data exempt by statute. G.L. c.150E, which governs public employee labor relations, was examined. Section 7(d) of the law provides that certain provisions of collective bargaining agreements override certain specific state statutes. However, the public records law is not one of the statutes cited under s.7(d).

Sections 8 and 10(a)(6) of G.L. c.150E were also considered. Section eight provides the grievance mechanism which culminates in arbitration while section ten prohibits refusal to participate in good faith in arbitration procedures. The relevant question was whether disclosure of the grievance petition by the government employer is a refusal to participate in good faith.

The Open Meeting Law was examined since it brings the "sunshine" to government meetings in a somewhat similar fashion that the public records law brings to government documents. The Open Meeting Law, G.L. c.39, ss.23A-23C allows certain executive session meetings to be closed. The Supreme Judicial Court has ruled that a grievance hearing pursuant to a collective bargaining agreement may be closed to the public as an executive session authorized by G.L. c.39, s.23B. Refusal to conduct a grievance hearing in executive session is prohibited by G.L. c.150E, s.10(a)(6). However, this result rests on an executive session provision which gives the government employer the discretion to close the grievance hearing. The essential fact is that no parallel exemption exists in the public records law, G.L. c.4, s.7(26). A record custodian does not have discretionary power to refuse to disclose a grievance petition, even though the hearing may be closed.

SPR 83/87

Issue: Requester appealed the failure of the Board of Assessors to provide copies of the personnel evaluation of the Deputy Assessor.

Held: The data requested is personnel information and falls within the confines of exemption (c) of G.L. c.4, s.7(26).

Rationale: In *Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983),* the court interpreted the first clause of exemption (c) to absolutely exempt all personnel and medical files or information of a personal nature relating to a specific individual. It has been held that an evaluation of work performance is personnel information. *Department of Air Force v. Rose, 425 U.S. 352, 376 (1976).* A Louisiana Court has held that evaluations of government employees were "very personal" and that disclosure of such would invade the subject's privacy. *Trahan v. Larivea, 365 So. 2d. 294, 300 (La. 1978).* As the record in question also related to a specific individual, it meets the *Globe* standard and is therefore exempt from disclosure under exemption (c).

SPR 83/55 and 83/60

Issue: Requester sought an advisory opinion concerning the public record status of a Suffolk County Municipality's "registered dog list".

Held: The list is public. Exemption (a) of G.L. c.4, s.7(26) was raised and found not to apply.

Rationale: Exemption (a) includes those records exempt by statute. Under G.L. c.140, s.147, each city or town clerk is required to make a record in the town books, except in Suffolk County, and this record shall be open to public inspection. What this means is that Suffolk County is exempt from furnishing these books to its clerks due to its organization, but the records are not exempt from public inspection. Therefore, exemption (a) of G.L. c.4, s.7(26) does not apply and the record is public.

SPR 82/95

Issue: Requester appealed the failure of a town clerk to provide access to names, ages and former jobs of certain pension recipients.

Held: G.L. c.4, s.7(26) exemption (c), the privacy exemption, was found inapplicable.

Rationale: Initially, the procedural matter of whether a corporation may act as a requester was answered in the affirmative; G.L. c.4, s.7(23) was cited. Substantively, a balancing test was used to weigh the individual's interest in privacy against the public's interest in disclosure. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623 (1980).* A prior determination (SPR No. 790) found that the public interest in knowing the name, date of birth, period of service and department of service of a retiree outweighed the individual's privacy interest which could be harmed by disclosure. Accordingly, the information requested was found to be a public record.

SPR 82/110

Issue: Requester appealed the failure of the Board of Registration and Discipline in Medicine to disclose the reviewer's comments contained on a doctor's docket review sheet.

Held: The material is exempt from disclosure under G.L. c.4, s.7(26) exemption (f), the investigatory exemption.

Rationale: One of the rationales for the use of the investigatory exemption in relation to police departments is the encouragement of private citizens to come forward and speak freely with police pursuant to matters under investigation. Also, police officers must feel free to be completely candid in recording investigatory observations. *Bougas v. Chief of Police of Lexington, 371 Mass. 59 (1976).* This rationale applies equally to the Board where disclosure of the Reviewer's Comments portion of the docket sheet could discourage Complaint Committee members reviewing future complaints from being completely candid in their observations and recommendations to the full committee. Therefore, the requested material falls within exemption (f).

SPR 83/81

Issue: Requester appealed the failure of a town clerk to provide a copy of the voting list from the town election. The custodian claimed that neither G.L. c.66, s.10(a) nor G.L. c.54, s.108 requires a custodian to furnish photocopies.

Held: Requester is entitled to a photocopy of the record under G.L. c.66, s.10(a) for a reasonable fee.

Rationale: G.L. c.66, s.10(a) provides that record custodians shall furnish copies of public records. The custodian claimed that G.L. c.54, s.108 operated independently of G.L. c.66, s.10(a). G.L. c.54, s.108 describes the manner in which people may gain access to voter lists. The law provides that the custodian shall furnish a copy or provide inspection. A narrow interpretation of this statute would suggest that the custodian may prescribe the manner of access. However, "statutes relating to the same subject matter should be considered as a whole and, if possible, construed as to make them effectual pieces of legislation 'in harmony with common sense and sound reason'." *Hardman v. Collector of Taxes, 317 Mass. 439, 442 (1945).*

The general effect of G.L. c.54, s.108 is to make checked voting lists a public record. In light of G.L. c.66, s.10(a), the correct interpretation of the statute would be that disclosure of the list includes the duty of furnishing copies. Therefore, the requester may exercise her right to public records in either manner.

Finally, the custodian's argument that copies would cause great inconvenience was refuted by *Lord v. Registrar of Motor Vehicles, 347 Mass. 608, 612 (1964),* which ruled that inconvenience does not relieve a custodian of his duties.

SPR 83/69

Issue: Requester appealed the refusal of an educational collaborative to grant access to the contract and letter of appointment of one of the collaborative employees.

Held: The requested records do not fall within exemption (c) of G.L. c.4, s.7(26), the privacy exemption, and are public except for a section revealing a phone number.

Rationale: Prior to the change in the public records law in 1973, a record was defined as public if it was required to be made by law or if it were statutorily public. Under the old law, G.L. c.66, s.17B makes contracts such as the Collaborative's public. After the public records law was changed in 1973, any record which was public prior to the enactment of the current G.L. c.4, s.7(26) was still a public record.

In connection with this determination, exemption (c) was examined. Although it was decided that the contract and appointment records were personnel data according to *Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438 (1983),* the data was not of a "personal" nature to qualify for exemption. Names and salaries of government employees as included in the requested records are not private facts. *Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978).*

Furthermore, under the balancing test of exemption (c), the public interest in disclosure of this data outweighs the individual's interest in privacy. See *Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980).*

SPR 83/36

Issue: The requester, a state employee who had applied for two positions but was not appointed to either position, sought the names of the persons appointed, the dates they were appointed, and the date he applied for the positions. The Department of Revenue refused to give him access to this information. It argued that the collective bargaining agreement prohibited the Department from directly communicating with a grievant. The requester in this case had filed a grievance.

Held: The requester's status as a grievant does not affect his rights under the public records law. G.L. c.66, s.10(a) gives the right to inspect or examine a public record to any person, therefore the identity of the requester is not relevant.

Rationale: G.L. c.66, s.10(a) gives any person the right to inspect or copy a public record. Access to a record pursuant to the public records law rests on the content of the record regardless of the circumstances of the requester. See *Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976).*

Exemption (a), which excludes records that are exempt by statute, does not apply since neither the collective bargaining agreement nor G.L. c.150E, which governs public employee labor relations, forbid the disclosure of grievance petitions.

Exemption (c), the privacy exemption, is also not applicable. Under exemption (c), the public interest in disclosure is balanced against the extent of the invasion of privacy. The privacy interest in the names of the persons appointed and the dates appointed is minimal. It is well recognized that public employees have less of an expectation of privacy than ordinary citizens. *Hastings & Sons Publishing Company v. City Treasurer of Lynn, 374 Mass. 812 (1978).* The strong public interest is shown by G.L. c.7, s.30, which provides that the names, designations, and dates of appointment of state employees are public. As to the dates that the employee applied for the positions, it has been held that exemption (c) does not preclude a person from viewing records which pertain to him. *Crooker v. Foley, No. 33785 (Suffolk Sup. Ct. Feb. 28, 1980).*

Additionally, neither the collective bargaining agreement nor G.L. c.150E contain any language expressly forbidding the government employer from communicating directly with a grievant.

Since none of the information requested falls within any of the exemptions to the public records law, the records must be disclosed to the requester pursuant to G.L. c.66, s.10(a).

Bougas v. Chief of Police of Lexington
371 Mass. 59 (1970)

Facts: Plaintiffs sought access to a police investigatory report regarding an incident between the plaintiffs and the police. This incident led to criminal proceedings. The Chief of Police denied the plaintiffs' request, and the plaintiffs filed a complaint in Superior Court pursuant to G.L. c.66, s.10. The judge ruled that the documents the plaintiffs sought were investigatory materials "necessarily compiled out of the public view by law enforcement officials" and that disclosure would prejudice the possibility of effective law enforcement and therefore exempt from disclosure under G.L. c.4, s.7(26)(f). The plaintiffs appealed to the Appeals Court.

Issue: Whether the police investigatory report is exempt from disclosure by G.L. c.4, s.7(26)(f).

Held: No.

Rationale: Exemption (f) is the result of the recognition that the disclosure of certain investigatory materials could detract from effective law enforcement thereby working against the public interest. The purposes of exemption (f) are the avoidance of premature disclosure of the Commonwealth's case prior to trial, the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions. Exemption (f) does not provide a blanket exemption for records kept by police departments. An agency engaged in law enforcement cannot rely on exemption (f) to shield every document in its possession from public disclosure. The investigatory exemption does not extend to every document placed within an investigatory file. The burden is on the agency to specifically prove that a certain document falls within the exemption.

The report requested constitutes a complete account of police investigatory efforts, including police officers' own observations of the incident in question, statements made by witnesses, information obtained from other sources, some of which are confidential, and leads and tips to be pursued. To subject such a report to public disclosure would "probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." G.L. c.4, s.7(26)(f). Therefore the report is exempt from the mandatory disclosure provisions of G.L. c.66, s.10(a).

Reinstein v. Police Commissioner of Boston
378 Mass. 281 (1979)

Facts: The requester sought access to records from the Boston Police Department concerning the discharge of weapons by police officers during the period of 1972 to 1976. The Boston Police Department denied access to these records citing a number of exemptions under G.L. c.4, s.7(26). As a result, the requester appealed to the Supervisor of Public Records seeking an administrative determination as to whether the information sought was subject to mandatory disclosure pursuant to G.L. c.66, s.10. The Supervisor determined that the records were exempt from disclosure because they contained Criminal Offender Record Information (CORI) as defined in G.L. c.6, s.167 (and see s.172) and so were "specifically ... exempted from disclosure by statute," G.L. c.4, s.7(26)(a), and were further exempt because they contained investigatory materials. *Id.*, (f). The requester then brought an action in Superior Court to gain access to the records. Upon cross-motions for summary judgment, a judge of the Superior Court denied all relief and directed entry of judgment for the defendants. The requester appealed and the Supreme Judicial Court took the case on their own motion.

Issue: Whether the requester may be entitled to access to some parts of the records even though portions of the same document may fall within the confines of an exemption of G.L. c.4, s.7(26).

Held: Yes.

Rationale: The Court first noted that none of the exemptions discussed (exemption (a), the privacy exemption (c), and the investigatory exemption (f)) operate as a blanket exemption from disclosure of all information contained in records of the Boston Police Department relating to the discharge of firearms by officers. Instead, in considering exemption (f), the court found that the statute invited a case-by-case consideration of whether access "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest... ." The Court further noted that the statute requires any non-exempt "segregable portion" of a public record to be disclosed. A discussion followed on the procedures to be used in determining whether and to what extent records may be exempted from disclosure when the claims of exemption by the custodian are not otherwise verifiable. The Court suggested that a judge should rely on *in camera* inspections to a limited extent, and on indexing of records with detailed justifications by the custodian for any non-disclosure. The Court then reversed the judgment for further proceedings below.

Hastings & Sons Publishing Co. v. City Treasurer of Lynn
374 Mass. 812 (1978)

Facts: The plaintiff requested the defendant, the treasurer of Lynn, to disclose the base salaries and overtime payments for the calendar year 1975 of all persons employed by the City of Lynn. The treasurer refused to comply with the request because there was an outstanding preliminary injunction prohibiting him from disclosing the payroll records of members of the Lynn Police Department. The plaintiff filed a complaint in Superior Court pursuant to G.L. c.66, s.10. The trial judge joined the police as parties defendant so that they could assert any enforcable right of privacy. The judge revoked the preliminary injunction and ordered the treasurer to disclose the requested records to the plaintiff. The policemen appealed to the Appeals Court.

Issue: Whether the payroll records of municipal employees are exempt from disclosure by G.L. c.4, s.7(26)(c).

Held: No.

Rationale: Although an employee may not want his or her salary publicized, such information does not constitute "intimate details of a highly personal nature." *Getman v. NLRB, 450 F. 2d. 670, 675 (D.C. Cir. 1971).* Names and salaries of municipal employees are not the kind of private facts that the Legislature intended to exempt from mandatory disclosure. It has been recognized that municipal employees are subject to restrictions and regulations not affecting private employers. See *Boston Police Patrolmen's Association v. Boston, 367 Mass. 368 (1975); Milton v. Civil Service Commission, 365 Mass. 368 (1974).* Even if disclosure of the payroll records of municipal employees would infringe upon the right of privacy, the right of the public to know what its public servants are paid must prevail. Since the public's right to know outweighs the privacy interest, exemption (c) is not applicable. Therefore the plaintiff is entitled to have access to the payroll records which include the name, address, base pay, overtime pay, miscellaneous payments, and gross pay of municipal employees, pursuant to G.L. c.66, s.10(a).

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THE REVIEW

FOIA

Freedom of Information Act

Volume 2, Number 2 APRIL 1984

I would like to take this opportunity to thank you for your overwhelming response to our quarterly publication, *The Review*. The Public Records Division of the Secretary of State's Office is pleased to provide you with the fourth issue.

The Review, a summary of determinations, appellate court decisions, and other pertinent information concerning public records, is currently mailed without charge to 300 citizens of the Commonwealth. Since the mailing list has grown to such a large number, we have found it necessary to limit the number of copies sent to an organization to three (3). You are free to reproduce the publication on your own, however.

The full text of each determination found in *The Review* may be obtained from the Public Records Division. Further information on the public records laws, G.L. c.66, s.10 and G.L. c.4, s.7(26), and the Public Records Access Regulations, 950 C.M.R. 32.00, is also available by contacting the Division. This issue of *The Review* includes a cumulative subject index encompassing all determinations from the July, 1983, issue to the present one.

We appreciate your interest in public records access and hope *The Review* continues to provide you with useful information.

Sincerely,

James W. Igoe

James W. Igoe
Supervisor of Public Records

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SPR 83/165

Issue: Requester sought a determination as to whether the bank statements and daily cash balances of a town are public records.

Held: The bank statements and cash balances are public records within the meaning of G.L. c.4, s.7(26).

Rationale: Exemption (d) provides a limited executive privilege for data relating to the development of government policy. To be included as part of the exempted deliberative process, the data must make recommendations or express opinions on legal or policy matters. *Vaughn v. Rosen*, 523 F. 2d. 1136, 1144 (D.C. Cir. 1975). Its application is limited to those matters in which the author has a reasonable expectation of confidentiality, without which he or she would be unwilling to express ideas fully and completely. Purely factual material is not included within the exemption. *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1972).

The cash balances and bank statements of a town are not part of the development of governmental policy. The requested records consist of purely factual material. Therefore, the cash balances and bank statements do not fall within exemption (d) nor any other exemption to the public records law.

SPR 83/125

Issue: Requester sought an advisory opinion on the public record status of the current employment status of individuals applying for a public position as held by the Board of Regents.

Held: This information is exempt from disclosure under G.L. c.4, s.7(26) exemption (c), the privacy exemption.

Rationale: Exemption (c) contains two distinct and independent clauses. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427 (1983). In *Globe* the Court held that "medical and personnel files or information are absolutely exempt from disclosure where the files or information are of a personal nature and relate to a particular individual." 388 Mass. at 438. In order for this information to be exempt under exemption (c), it must meet the criteria outlined in *Globe*.

The first and third criteria are easily met in this case. In *State v. Hernandez*, 556 P. 2d. 1174, 1175 (N.M. 1976), the Court held that the selection of applicants and applications were integrally related to the personnel process. Additionally, the requested information relates to specific individuals.

The remaining inquiry is whether such information is of a "personal nature." In *United States Department of State v. Washington Post Co.*, 102 S. Ct. 1957, 1961 at N.4 (1982), the Court utilized the standard of whether disclosure of the record could harm the subject to determine if the record was "personal." It was determined that the disclosure of the fact that an individual is seeking a career change could be harmful. Moreover, such a disclosure could also harm the applicant's ability to function effectively in his or her current employment position. Accordingly, the requested information was found to be exempt from mandatory disclosure under exemption (c).

SPR 83/131

Issue: Requester sought an advisory opinion as to whether work papers used by a town Board of Assessors in developing fair market valuation figures for residential improvements are public records.

Held: The work papers of assessors are public records within the meaning of G.L. c.4, s.7(26).

Rationale: The town Board of Assessors compiled the work papers in its determination of fair market values and therefore, the papers requested fall within the "made or received" requirement of G.L. c.4, s.7(26). Exemption (d) provides a limited executive privilege for data relating to the development of government policy. To be included as part of the exempted deliberative process, the data must make recommendations or express opinions on legal or policy matters. *Vaughn v. Rosen*, 523 F. 2d. 1136, 1144 (D.C. Cir. 1975). It explicitly does not include purely factual matters used in the formulation of policy positions. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 89; 93 S. Ct. 827, 837 (1973).

The work papers consist of the Board's factoring system in determining fair market value. From the statistical analysis a recommended valuation is determined. The work papers consist of purely factual and mathematical materials which do not fall within exemption (d). Accordingly, the work papers of a Board of Assessors are public records within the meaning of G.L. c.4, s.7(26).

SPR 83/94

Issue: Requester sought an advisory opinion on the public record status of the list of names of applicants for the position of president of a community college.

Held: The list is exempt from disclosure under G.L. c.4, s.7(26) exemption (c), the privacy exemption.

Rationale: Exemption (c) contains two distinct and independent clauses. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427 (1983). In the *Globe* case, the Court held that "medical and personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." 388 Mass. at 438. In order for the requested data to be exempt under exemption (c) it must be personnel information of a personal nature related to a specific individual.

The screening of applicants is integrally related to the personnel process. See *State v. Hernandez*, 556 P. 2d. 1174 (N.M. 1976). "Information of a personal nature" has been interpreted to mean information that would not normally be shared with strangers. See *Morrison v. School District 48, Washington County*, 631 P. 2d. 786, 789 (Ore. App. 1981) (interpretation of Oregon statute). The identification of an individual as an applicant for the position of college president reveals that the person is actively pursuing a career change. It was determined that such information is of a personal nature, relates to a particular individual and is within the meaning of personnel information. Accordingly, the requested information was found to fall within the confines of exemption (c).

Determinations

SPR 84/11

Issue: Requester sought access to student evaluations of the coaching staff held by a local high school.

Held: The evaluations are exempt from disclosure under G.L. c.4, s.7(26), exemption (c), the privacy exemption.

Rationale: Exemption (c) contains two distinct and independent clauses. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427 (1983). The first clause is dispositive of this appeal. In the case of *Connolly v. Bromery*, 15 Mass. App. Ct. 661 (1983), the Court held that student evaluations of University of Massachusetts professors were personnel information of a personal nature and as such were absolutely exempt from public disclosure. 15 Mass. App. Ct. at 664. Accordingly, the students' evaluations of the coaching staff are personnel information of a personal nature and therefore are exempt from mandatory disclosure by exemption (c).

SPR 83/156

Issue: Requester sought a determination as to whether the names and addresses of individuals receiving low interest mortgage loans through the Massachusetts Housing Finance Agency are public records within the meaning of G.L. c.4, s.7(26).

Held: The records sought are not public records. They are exempt from disclosure pursuant to G.L. c.4, s.7(26)(c), the privacy exemption.

Rationale: Analysis under exemption (c) requires that the seriousness of any invasion of privacy be balanced against the public right to know. *Attorney General v. Collector of Lynn*, 377 Mass. 151 (1979). The Supreme Judicial Court has stated that "the public right to know should prevail unless disclosure would publicize 'intimate details' of a 'highly personal nature.' " *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 626 (1980). Although there is a strong public interest in the expenditure of public monies by public officials, this interest is outweighed by the strong privacy interests in the information sought. Disclosure of the names of the mortgage recipients would reveal the income levels of the recipients. Despite the fact that it would be the income range of the recipients that would be revealed as opposed to their exact income, such information is not the kind of information an individual would readily divulge to a stranger. The recipients held a genuine expectation of confidentiality in applying for and receiving the mortgages. Their public identification as recipients could cause embarrassment to them. *Attorney General v. Collector of Lynn*, 377 Mass. 151 (1979). It is precisely this type of private fact that constitutes an "intimate detail" of a person's life, the disclosure of which would constitute a serious invasion of personal privacy. *Hastings and Sons Publishing Co. v. City Treasurer of Lynn*, 374 Mass. 812, 818 (1978). Therefore, because of the applicability of exemption (c), the names and addresses of low interest mortgage recipients are not subject to the disclosure provisions of G.L. c.66, s.10.

SPR 83/146

Issue: Requester sought access to residential data collection cards held by the town Board of Assessors.

Held: Exemption (c) does not apply to the residential data collection cards held by the assessors. These cards are therefore public records subject to the mandatory disclosure provisions of G.L. c.66, s.10.

Rationale: In *Attorney General v. Board of Assessors of Woburn*, 375 Mass. 430 (1978), the Court held that field assessment cards prepared by a private contractor to assist a town in reassessing real property values were public records. The field assessment cards are substantially identical to the residential data collection cards. Both contain a record of ownership and addresses of the properties, physical characteristics of the building and property, building expenses, and the value associated with each property. In the *Woburn* case, the Court stated that any consideration of exemption (c) in respect to these records was "irrelevant." *Woburn*, at 433. Additionally, under the State Building Code Regulations, 780 C.M.R. 108.7, records containing the same basic data are required to be made available for public inspection. Accordingly, the requested records were determined to be public records and are therefore subject to the mandatory disclosure provisions of G.L. c.66, s.10.

SPR 83/159

Issue: Whether the monthly operational reports submitted by a hazardous waste treatment facility to the Department of Environmental Quality Engineering are public records.

Held: Exemptions (a) and (g) are not applicable to these reports, therefore making them public records.

Rationale: Pursuant to G.L. c.21C, s.12, the Commissioner may classify records submitted to DEQE as confidential if he or she determines that they relate to secret processes, methods of manufacture, or production or that disclosure would divulge a trade secret. The Commissioner determined that the reports were not confidential pursuant to G.L. c.21C, s.12, therefore exemption(a), which exempts from disclosure records that are made exempt by statute, is not applicable to these reports.

Exemption (g), which exempts trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy, was also considered. These reports were required to be filed, therefore exemption (g) is not applicable to these records because they were not voluntarily provided.

Determinations

SPR 83/174 and 83/180

Issue: Requester sought copies of a summary of an autopsy report.

Held: Autopsies are public records and do not fall within the confines of exemption (c), the privacy exemption.

Rationale: Exemption (c) contains two distinct and independent clauses. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427 (1983). The controverted record was examined under both clauses. The first clause was found to be inapplicable as autopsies cannot be considered medical files or information. This determination is based on the fact that the underlying goal of the medical file exemption is to preserve and protect the integrity of the doctor-patient relationship. As this relationship is no longer present after death, it does not require any further protection.

It was also determined that the second clause of exemption (c) did not apply to autopsy reports. It is a well-established principle that an individual's common law right to privacy is a personal right which ceases at death. The second clause will therefore not apply to autopsy information as the decedent no longer has any privacy rights. Accordingly, the requested document is not exempt under exemption (c). This information is therefore a public record subject to the mandatory disclosure provisions of G.L. c.66, s.10.

SPR 83/166 and 83/170

Issue: Requester sought an advisory opinion on the public records status of the Board of Appeals' findings and orders as maintained by the Merit Rating Board.

Held: The requested record is not a public record pursuant to G.L. c.4, s.7(26) because of the applicablility of exemption (a).

Rationale: G.L. c.6, s.183 specifically indicates that information maintained by the Merit Rating Board cannot be disseminated for other than motor vehicle purposes. This is clearly evidenced by the criminal penalties that flow from the unauthorized dissemination of the Board's files to anyone other than an insurance company as provided in the statute.

The information concerning the Board of Appeals' findings and orders is compiled and gathered by the Merit Rating Board to facilitate and implement the continued operation of merit rating with respect to motor vehicle insurance. Therefore, G.L. c.6, s.183 proscribes the disclosure of this information, and the findings and orders of the Board of Appeals maintained by the Merit Rating Board are not public records pursuant to G.L. c.4, s.7(26)(a).

SPR 84/20

Issue: Requester sought copies of daily police logs containing the names and addresses of burglary victims.

Held: Daily police logs are public records under G.L. c.41, s.98F.

Rationale: G.L. c.41, s.98F provides that all entries in daily logs maintained in chronological order are public records, unless otherwise provided by law. Examples of those portions that are exempted from disclosure by law are information concerning rape and related offenses (G.L. c.41, s.97D) and information concerning juveniles (G.L. c.119, s.60A and G.L. c.120, s.21). Information relating to burglary victims is not exempt from disclosure.

SPR 83/154

Issue: Requester sought access to all records, reports, memoranda, photographs and any other documents which referred to him by name in the custody of the Department of Public Safety.

Held: Records reflecting CORI information were exempt from mandatory disclosure under exemption (a). Other documents that contained officers' hypotheses, investigative techniques and confidential sources were exempt under exemption (f), the investigatory exemption.

Rationale: Working derivatively through exemption (a), the Criminal Offender Record Information (CORI) statute (G.L. c.6, s.167 et. seq.) exempts from disclosure records which are compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge. Accordingly, this statute exempted from disclosure those records in the requester's file which fit the definition of CORI. This included visitation information relative to an incarcerated individual, photographs and fingerprints of arrested individuals, and bond forms. The requester was directed to contact the Criminal History Systems Board to obtain any CORI information of which he was the subject.

Another exemption considered was exemption (f), the investigatory exemption. The purpose of this exemption is to provide protection for those law enforcement activities which require a cloak of confidentiality to succeed. The exemption aims at "the avoidance of premature disclosure of the Commonwealth's case prior to trial, the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses, and interim conclusions." *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976), cited with approval in *Reinstein v. Police Commissioner of Boston*, 378 Mass. 281, 284 (1978). The file contained clear examples of what the Court intended to protect in *Bougas, supra.* This included investigatory reports containing officers' observations and hypotheses, specific references to surveillance and investigatory techniques, references to confidential sources of information, and investigatory reports from cases not yet closed. Accordingly, this information was found to be exempt from mandatory disclosure under exemption (f), the investigatory exemption.

Determinations

SPR 84/24

Issue: Requester sought an advisory opinion as to whether the former addresses of housing authority tenants are public records.

Held: The former addresses of housing authority tenants are not public records subject to the disclosure provision of G.L. c.66, s.10 because of the applicability of exemption (c).

Rationale: Analysis under exemption (c) requires that the seriousness of any invasion of privacy be balanced against the public right to know. *Attorney General v. Collector of Lynn*, 377 Mass. 151 (1979). Although there is a strong public interest in the expenditures of public monies by public officials, this interest is outweighed by the strong privacy interest in the information sought. The Supreme Judicial Court has recently held that information concerning the whereabouts of an individual who is receiving government aid constitutes an unwarranted invasion of privacy when this information is given in exchange for such aid. *Torres v. Attorney General*, 391 Mass. 1, 10 (1984). Moreover, the expectation of the individual was found to be a factor in determining whether disclosure of information might be an invasion of privacy. The housing authority tenants submitted the background information appearing on their housing applications for the sole purpose of receiving housing benefits. There was a reasonable expectation that this information would not be disclosed publicly or made available to other agencies without their consent. Release of their former addresses would constitute an unwarranted invasion of privacy because it would result in the identification of an individual as recipient of government aid. Therefore, exemption (c) is applicable to the disclosure of the former addresses of housing tenants and that information is not subject to the disclosure provision of G.L. c.66, s.10.

SPR 83/164

Issue: Requester sought an advisory opinion on the public records status of recommendations submitted to a town by an accounting firm, pursuant to an audit.

Held: The recommendations constituted an audit report which is an integral part of an audit. Audits are public records pursuant to the Acts of 1973, c.1050, s.4 which expanded the definition of a public record.

Rationale: Prior to 1973 a public record was either any record required by law to be made or received for filing or any record specifically made public by statute. G.L. c.66, s.17B provided that audits were public records. In 1973 the definition of a public record was expanded to include all data held by the government unless it fell within a specific exemption. Although G.L. c.66, s.17B was repealed upon the enactment of the broader definition of public records, the legislature specified that any record that was public prior to this enactment would remain public. St. 1973, c.1050, s.6; *Hastings and Sons Publishing Co. v. City Treasurer of Lynn*, 374 Mass. 812, 816 (1978). Therefore, audits, which were specifically designated public records prior to 1973, remain public under the broader definition found in G.L. c.4, s.7(26).

SPR 83/193

Issue: Requester sought an advisory opinion on the public record status of telephone call records made in the course of a police investigation.

Held: The last four digits of the telephone numbers of persons called pursuant to a police investigation fall within exemption (f) of G.L. c.4, s.7(26).

Rationale: One of the purposes of exemption (f), the investigatory exemption, is to encourage private citizens to come forward and supply information to the police pursuant to matters under investigation. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59 (1976). Telephone numbers, to the extent that they reveal the identities of persons called in the course of an investigation by the police department, clearly fall within the purposes of exemption (f) as disclosure of the identities of such persons would serve to inhibit both present and future law enforcement efforts. Since the identities of persons called can only be ascertained by the area code and the complete seven digit telephone number, deleting only the last four digits from the records will sufficiently protect the identities of such persons.

SPR 84/04

Issue: Requester sought access to a statement of revenue and expenses for cable television companies as held by the Massachusetts Cable Television Commission.

Held: The records sought fall within exemption (a) of G.L. c.4, s.7(26) and therefore are exempt from disclosure.

Rationale: Exemption (a), which excludes records that are exempt from disclosure by statute, is applicable. G.L. c.166A, s.8 specifically mandates that this information, required to be filed with the Commission, is for official use only. Therefore, this statute prohibits the disclosure of these records to the public. Accordingly, these records fall within exemption (a) of G.L. c.4, s.7(26) and therefore are exempt from disclosure.

SPR 84/14

Issue: Requester sought an advisory opinion on whether a school committee may require its members to file particular forms in order to obtain access to public records.

Held: A record custodian may not establish procedures for obtaining access to public records which infringe upon a requester's rights of access as provided for in 950 C.M.R. 32.05 of the Public Records Access Regulations.

Rationale: An individual's right of access to public records is granted by G.L. c.66, s.10(a). This statute provides access to "any person." Accordingly, a person's status as a public official is irrelevant in determining whether he or she is entitled to have access to public records.

G.L. c.66, s.10 and 950 C.M.R. 32.05 establish the basic framework under which a record requester and a record custodian must operate. A custodian may not impose any public records access procedures which are in excess of that permitted by 950 C.M.R. 32.05.

SPR 83/145

Issue: What is the maximum fee that a record custodian may charge for providing copies of a public record?

Held: The maximum fee that may be charged for copies of public records is $ .20 per page. 950 C.M.R. 32.06(a).

Rationale: The custodian charged $ .25 per page for copies of public records. This fee was based on a town ordinance passed pursuant to G.L. c.262, s.34(65). This authority, however, was extinguished by the provisions of chapter 1050 of the Acts of 1973, which repealed G.L. c.262, s.34(65). Accordingly, the Attorney General stated that the Supervisor of Public Records' fee schedule promulgated under G.L. c.66, s.10 governs the fees which may be assessed for copies of municipal public records. Op. Atty. Gen. 77/78-10. The validity of the fee schedule promulgated by the Supervisor of Public Records was upheld in *Supervisor of Public Records v. City Clerk of Revere*, No. 25859 (Suffolk Super. May 10, 1983). Therefore, the maximum a custodian may charge is $ .20 per page for photocopies of public records.

SPR 84/22

Issue: Requester sought a copy of the results obtained from a Breathalyzer test administered to a specific individual.

Held: The results of a Breathalyzer test are exempt from disclosure by exemption (c), the privacy exemption.

Rationale: In determining whether a record falls within the second clause of exemption (c), the public's right to know is weighed against the privacy interest which may be harmed by disclosure. The public's right to know should prevail unless disclosure would publicize "intimate details of a highly personal nature." See *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 625 (1980). In *Attorney General v. Assistant Commissioner*, 380 Mass. at 626, the Court cited "alcoholic consumption" as an example of an intimate detail. Since the results of a Breathalyzer test relate to the fact of alcoholic consumption, which is an intimate detail, it would constitute an invasion of an individual's privacy to release them. Accordingly, the results of a Breathalyzer test fall within exemption (c) and are not subject to mandatory disclosure.

SPR 84/09

Issue: Requester sought an advisory opinion on the public record status of the age and sex of public employees.

Held: The sex and age of public employees are not exempt from disclosure by exemption (c) and therefore are public records.

Rationale: Medical and personnel files or information are absolutely exempt from mandatory disclosure where they are of a personal nature and relate to a particular individual. See *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 438 (1983). The information requested is personnel information and it relates to specific individuals. However, this information is not sufficiently personal to bring it within the protection of exemption (c). Public employees have a lesser expectation of privacy than ordinary citizens. See *Hastings and Sons Publishing Co. v. City Treasurer of Lynn*, 374 Mass. 812 (1978). An individual's sex and age may be found on other public records such as birth certificates. See G.L. c. 46, s. 1 and *Attorney General v. Collector of Lynn*, 377 Mass. 151, 157-158 (1979). Therefore, the sex and age of public employees are not exempt from disclosure by exemption (c).

SPR 84/40

Issue: Requester sought an advisory opinion concerning the public record status of the W-2 forms for members of the town police department.

Held: The privacy exemption, exemption (c), applies to some portions of the forms and these portions are therefore exempt from mandatory disclosure under G.L. c.66, s.10.

Rationale: Exemption (c) contains two distinct and independent clauses. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427 (1983). The second clause is dispositive of this case. When determining whether a record falls within the second clause of the privacy exemption, the public's right to know must be balanced against the individual's privacy interests which may be harmed by disclosure. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 262 (1980). In *Hastings and Sons v. City Treasurer of Lynn*, 374 Mass. 812 (1978), the Court held that the names and gross salaries of municipal employees are public records. However, when applying the balancing test to the remaining information on the form, i.e. that information reflecting an individual's social security number, and the amounts withheld from gross pay due to federal and state taxes and FICA, it was determined that the individual's privacy interest in this information outweighed the public interest. This information, therefore, is not subject to the mandatory disclosure provisions of G.L. c.66, s.10.

Torres v. Attorney General
391 Mass. 1 (1984)

Facts: Plaintiff brought an action in Federal Court against certain state officials seeking education and mental health services for himself and other emotionally disturbed minors. In defending this action, an Assistant Attorney General requested and received from the Department of Social Services (DSS) information from its files concerning the plaintiff. The information included, but was not limited to, a chronology of the plaintiff's geographic location. The plaintiff, who had been a client of the DSS, brought this action against the DSS and the Attorney General alleging that the release of this information violated the Fair Information Practices Act (FIPA).

Issue: Whether the disclosure of information concerning the geographic location of an individual receiving government benefits by DSS was an unwarranted invasion of privacy.

Held: Yes.

Rationale: The Fair Information Practices Act (FIPA), G.L. c.66A, limits access to "personal data" maintained by a state agency. Generally, it prohibits the dissemination of "personal data," without the data subject's consent, held by an agency unless authorized by statute or regulations consistent with FIPA. Since "personal data" as defined by FIPA does not include information contained in a public record, it is necessary to determine whether the information disclosed was a public record.

Exemption (c) excludes information or data "relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy" from the definition of public records. G.L. c.4, s.7(26)(c). Exemption (c) requires a balancing of interests (the public's right to know against the individual's right to protection against an unwarranted intrusion into his or her privacy) rather than an objective determination of fact. A state agency, seeking to disclose information that would invade an individual's privacy, has the burden of showing that such an invasion is warranted. Since there was no evidence that the invasion of privacy was warranted, the information disclosed was "personal data" not subject to disclosure.

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THE REVIEW

Freedom of Information

Access to Public Records

MICHAEL JOSEPH CONNOLLY Secretary of State

FOIA
Freedom of Information Act

THE REVIEW

Volume 2, Number 3 JULY 1984

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SPR 83/187

Issue: Requester sought a list of Vietnam Veterans who reside in the Commonwealth from the Special Commission on the Concerns of Vietnam Veterans.

Held: The Special Commission on the Concerns of Vietnam Veterans, as an agent of the General Court, is governed by G.L. c.66, s.18. Consequently, its records are exempt from the mandatory disclosure provisions of G.L. c.66, s.10(a) through the operation of exemption (a).

Rationale: The records of the Office of the General Court are exempt from public disclosure under G.L. c.66, s.18, through the operation of exemption (a). The statute provides that chapter 66 does not apply to the records of the general court and that materials kept by the Commissioner of Veterans Services are not public records. The threshold question is whether the Special Commission on the Concerns of Vietnam Veterans is an agent of the General Court. If so, the requested list is exempt under G.L. c.66, s.18. The Attorney General has previously addressed the governmental status of special commissions. Op. Atty. Gen., June 29, 1973. The Special Commission on the Concerns of Vietnam Veterans' enabling legislation, St. 1981, c.351, s.291, contains substantially the same language as the enabling legislation of the special commission discussed by the Attorney General. The Attorney General concluded that a special commission is an agent performing an investigative function of the General Court. See *Commonwealth v. Fanulli* 352 Mass. 95, 100 (1967). Therefore, G.L. c.66, s.18 is applicable to the Special Commission on the Concerns of Vietnam Veterans, and operates through exemption (a) to exempt its records from public disclosure.

SPR 84/23

Issue: Whether the names, addresses and birthdates of children under the age of 3 years is a public record.

Held: The names, addresses and birthdates of children under the age of 3 are public records as they do not fall within exemption (c).

Rationale: Analysis under the second clause of exemption (c) requires the balancing of the public's right to know against the privacy interest which may be harmed by disclosure. The public's right to know should prevail unless disclosure would publicize intimate details of a highly personal nature. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston,* 380 Mass. 623, 625 (1980).

G.L. c.51, s.4 requires cities and towns to compile an annual list, to be made available to the public, containing the name, residence and age or date of birth of all residents three years of age or older. This statute recognizes the public interest in this type of information. Although this statute applies to persons three years of age and older, it is evidence that the legislature does not consider the disclosure of this type of information to be a clearly unwarranted invasion of personal privacy. Therefore exemption (c) does not apply to this information.

SPR 84/44

Issue: Custodian sought an advisory opinion concerning the public record status of the social security numbers of public employees.

Held: The social security numbers are exempt from public disclosure under exemption (c), the privacy exemption.

Rationale: The application of exemption (c) requires the utilization of a balancing test, weighing the public interest served by disclosure against the individual privacy interests that may be harmed by disclosure. As the public records law favors disclosure, it is only when the privacy interest exceeds the public disclosure interest that the exemption is properly applied. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 625 (1980); *Torres v. Attorney General*, 391 Mass. 1, 8-10 (1984). In SPR 618 it was determined that social security numbers are not public records subject to mandatory disclosure because of the strong privacy interests that would be affected by disclosure, and the minimal public interest in the revelation of any individual's social security number. This is supported by United States District Court decision, *Swisha v. Department of the Air Force*, 495 F. Supp. 337, 340 (1980), which held that social security numbers, contained in a report to the federal government, were properly withheld because disclosure would "constitute a clearly unwarranted invasion of personal privacy."

SPR 84/39

Issue: Requester sought access to motor vehicle accident operator's reports.

Held: The motor vehicle accident operator's reports are defined as public records under the grandfather clause of St. 1973, c.1050, s.6. As public records they are subject to mandatory public disclosure under G.L. c.66, s.10.

Rationale: The pre-1973 definition of public records rested on whether the record had been made or received pursuant to a requirement of law. St. 1969, c.831, s.2. Under G.L. c.90, s.26, motor vehicle accident operator's reports, which were required to be filed with the registrar, were determined to be public records under the pre-1973 definition. *Lord v. Registrar of Motor Vehicles*, 347 Mass. 608 (1964). The grandfather clause of St. 1973, c.1050, s.6 provided that records which were public records prior to 1973 were to remain public records. Since the reports required by G.L. c.90, s.26 were public records prior to 1973, they remain public records under the grandfather provisions. As public records they are subject to mandatory public disclosure under G.L. c.66, s.10.

Determinations

SPR 84/78

Issue: Custodian sought an advisory opinion concerning whether fees may be charged for search and compilation time of public records and for staff time spent supervising requesters' inspection of records.

Held: Fees may be assessed for search and compilation time for requests which take twenty minutes to complete, but not for the time supervising the requesters' inspection of the records. 950 CMR 32.06.

Rationale: Fees that a record custodian may charge are governed by 950 CMR 32.06(1)(a). This section provides that the custodian may charge up to "a pro-rated fee of six dollars per hour for search time and segregation time expenses for requests... which take more than twenty minutes to complete." Therefore, the custodian may charge for the search and compilation time. However, 950 CMR 32.06(4) provides that "a custodian may not assess a fee for the mere inspection of public records." Thus, a custodian may not charge for staff time spent supervising requesters' inspection of records.

SPR 84/42

Issue: Requester sought records indicating why his pistol permit application was denied.

Held: Records reflecting CORI information are exempt from mandatory disclosure under G.L. c.4, s.7(26) exemption (a).

Rationale: Working derivatively through exemption (a), the Criminal Offender Record Information (CORI) statute (G.L. c.6, s.167 et. seq.) exempts from disclosure records which are compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge. The requester was directed to contact the Criminal History Systems Board to obtain any CORI of which he was the subject.

SPR 84/56

Issue: Requester sought anonymous parent responses to a school system's evaluative survey.

Held: The responses are public records and do not fall within the confines of exemption (c), the privacy exemption.

Rationale: Exemption (c) contains two distinct and independent clauses. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427 (1983). Only the second clause is relevant to this case. The second clause exempts from disclosure information relating to a named individual which may cause an unwarranted invasion of personal privacy if disclosed. The parents' responses do not contain any references to named individuals. Additionally, the respondents are not identified. Therefore, exemption (c) is not applicable. Further, a prior promise of confidentiality will not cause an exemption to apply. It is not a determinative factor and cannot be used to frustrate the dominant policy of disclosure. *Ackerly v. Lees*, 420 F.2d. 1336, 1339-1340, n.3 (D.C. Cir. 1969).

SPR 83/196

Issue: Requester sought an evaluation of a school district's Pupil Personnel Services Department, which concerns special needs children.

Held: Damaging statements which adversely affect the employment of named individuals are exempt from disclosure under the balancing portion of exemption (c). Statements which reflect the personal opinions of the writers, as opposed to the policy of the governmental body, are exempt under exemption (d).

Rationale: Exemption (c) has been interpreted to contain two independent and distinct clauses. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427 (1983). The first clause relates to medical and personnel files. In order to be exempt from disclosure under the first clause, a record must meet the three-pronged test set forth in *Globe*: the record must a) constitute a personnel or medical file, b) be of a personal nature, and c) relate to a particular person. The evaluation report does not meet the third criterion because it does not pertain to a specifically named individual. Thus, the evaluation is not exempt from disclosure under the first clause of exemption (c).

In order for a record to be exempt through the second clause of exemption (c), the competing interests of the public's right to know must be outweighed by the individual's privacy interest which may be harmed by disclosure. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 625 (1980). There is a strong public interest in determining the effectiveness of publicly funded programs and their management. This public interest, however, is outweighed by specific instances in the evaluation report. Where disclosure of certain information would have an adverse impact on an individual's ability to obtain future employment or to function in a current position, that information falls within the confines of the privacy exemption. *Attorney General v. School Committee of Northampton*, 375 Mass. 121, 132, n.5 (1978). Those portions of the report which contain negative or damaging statements which would adversely affect the employment or employment prospects of a named individual fall within the second clause of exemption (c) and therefore are exempt from disclosure.

Other portions of the evaluation report are exempt from disclosure under exemption (d), which provides a limited executive privilege in the development of governmental policy. Exemption (d) applies only to data, memoranda or letters which are found within the deliberative process. To be part of the deliberative process, the document must make recommendations or express opinions on policy matters. *Vaughn v. Rosen*, 523 F.2d. 1136, 1144 (D.C. Cir. 1975). The exemption covers documents which reflect the personal opinions of the writers rather than the policy of the governmental body. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d. 854, 866 (D.C. Cir. 1980). Thus, the opinions of the writers of the evaluative report which do not reflect the school boards adopted policy are exempt from disclosure under exemption (d).

Determinations

SPR 84/66

Issue: Custodian sought an advisory opinion as to whether the names and applications of finalists for the position of school superintendent were public records.

Held: The applications constitute personnel information and as such are absolutely exempt from public disclosure under exemption (c). The names of the finalists, however, are not of a "personal nature" and therefore are not exempt from public disclosure under exemption (c).

Rationale: Under the first clause of G.L. c.4, s.7(26)(c), the court has said that "medical or personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 438 (1983). Employment applications are the types of materials which are primarily found in personnel files and their contents are "particularly personal and volatile." *Connelly v. Bromery*, 15 Mass. App. Ct. 661, 664 (1983). As such, the employment applications are absolutely exempt from disclosure under exemption (c). The remaining questions in this case is whether the names of the finalists are of "a personal nature." It is clear that a candidate's identity becomes progressively less personal as the individual inches closer to the final stages of the applicant screening process. It is difficult to argue that the identity of a finalist for a public position is of a personal nature where a semi-finalist should expect public discussion of his or her candidacy. *Attorney General v. School Committee of Northampton*, 375 Mass. 127, 130 (1978). As the names of the finalists are not of a personal nature, they are not within the confines of the first clause of exemption (c) and thus are subject to public disclosure.

SPR 82/106

Issue: Requester sought access to trial balances and projected expenditures for various city departments.

Held: Neither exemption (h) nor exemption (d) are applicable and thus the records are subject to public disclosure pursuant to G.L. c.66, s.10(a).

Rationale: Exemption (h) applies to bids and proposals. As neither a bid nor a proposal is being requested, this exemption is not applicable. Exemption (d) provides a limited executive privilege to the government which serves to encourage the candid and open exchange of ideas relating to policy positions under consideration. Those subjective judgments and evaluations which might not otherwise be expressed if they were not protected from public disclosure are the focal point of exemption (d). Factual reports such as those requested, which are reasonably complete, do not require the same level of confidentiality to insure their candor and completeness. Further, the exemption looks to the state of mind of the author: if confidentiality is both expected and required for the author to make an honest and encompassing report, the exemption may apply. Trial balances and projected expenditures do not fall within exemption (d) and thus are subject to public disclosure.

SPR 83/70

Issue: Custodian sought an advisory opinion concerning whether he must grant access to minority business certification applications.

Held: The minority business certification applications are neither exempt under exemption (g), the trade secret exemption, nor exemption (c), the privacy exemption.

Rationale: Exemption (g) has six criteria which must be met in order to apply. The third criterion, that the record be "for use in developing governmental policy," has not been met by the record in question. The custodian uses the applications to implement, not develop, policy. Therefore, the applications are not exempt from disclosure under exemption (g). Further, the applications do not fall within the confines of exemption (c). The information requested on the application form does not permit identification of the enterprises involved and thus there can be no invasion of privacy. Even if it were possible to identify the specific enterprises, exemption (c) only applies to individuals. The applications are subject to public disclosure pursuant to G.L. c.66, s.10(a).

SPR 84/27

Issue: Requester sought an advisory opinion on the public records status of a list containing the following information:
1) the mailing addresses of the students residing in the town; and
2) the mailing addresses of the students' parents or guardians.

Held: While the names and addresses of students are statutorily public pursuant to G.L. c.51, s.4, the names and addresses of their parents or guardians are exempt from disclosure by G.L. c.4, s.7(26)(a).

Rationale: Institutions which receive federal funds for educational programs are prohibited from releasing student records to the general public. See the Family Educational Rights and Privacy Act (FERPA) 20 U.S.C.S. 1232(g)(b)(1) and 603 CMR 23.07(4). The name and address of a student's parent or guardian is part of the student record. Therefore the name and mailing address of a student's parent or guardian is exempt by virtue of FERPA operating derivatively through exemption (a).

Exemption (a) however does not protect the names and mailing addresses of the students from disclosure as FERPA does not prohibit the release of this information. See U.S.C.S. 1232(g)(a)(5)(a). Additionally, the names and addresses are public pursuant to G.L. c.51, s.4 which requires school committees to maintain for public inspection, a list containing the names and addresses of all residents 3 through 21 years of age.

Determinations

SPR 84/28

Issue: Requester sought a survey of the University of Massachusetts Medical Center's police/security department.

Held: The portions of the survey that relate to internal personnel rules and practices are exempt from public disclosure through exemption (b). Recommendations and conclusions found in the survey are exempt through exemption (d).

Rationale: Exemption (b), which relates solely to internal personnel rules and practices, is known as the housekeeping exemption because it pertains to matters that are of little or no legitimate public interest. The survey contains portions which pertain to internal personnel rules and practices. Data falls within exemption (b) only when disclosure would significantly impede government operations. There is a public interest in seeing that a police/security department's enforcement abilities aren't impaired by disclosure of its operations. Thus, those portions of the survey which relate to internal personnel practices are exempt through exemption (b). Exemption (d) applies only to data, memoranda, or letters found within the deliberative process. A document is part of the deliberative process if it makes recommendations and conclusions on legal and policy matters. *Vaughn v. Rosen*, 523 F.2d. 1136, 1144 (D.C. Cir. 1973). The survey makes recommendations and conclusions about the police and security departments, such as methods to achieve more effective and efficient services and reasons for present security problems. These express, specific recommendations and conclusions would not have been as forthrightly made without some expectation of confidentiality. Accordingly, the recommendations and conclusions are exempt from public disclosure under exemption (d).

SPR 84/65

Issue: Requester sought information deleted from an Office for Children report investigating the death of a child.

Held: The Office for Children (OFC) is a law enforcement agency for the purposes of G.L. c.4, s.7(26)(f) and the information deleted is exempt from public disclosure under exemption (f).

Rationale: The OFC is authorized under 102 CMR 7.03 to investigate child care facilities and if necessary revoke the facilities' licenses. Further, the Superior Court has jurisdiction to enforce the orders of the OFC under G.L. c.28A, s.16. Accordingly, the OFC is a civil law enforcement agency for the purposes of the public records statute. The remaining question is whether the information deleted is exempt from disclosure under exemption (f), the investigatory exemption. One of the purposes of exemption (f) is the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61 (1976). The information deleted from the OFC's investigatory report concerns the identity of witnesses. Release of such information would hinder the OFC's investigatory activities by not assuring citizens confidentiality when they come forward as witnesses. Thus the deleted information which reveals the identities of witnesses is exempt from disclosure under exemption (f).

SPR 84/50

Issue: Custodian sought an advisory opinion concerning whether applications for government subsidized housing programs are public records as defined by G.L. c.4, s.7(26).

Held: The applications are exempt from public disclosure under exemption (c).

Rationale: Analysis under exemption (c) requires that the public's right to know be balanced against the individual's privacy interest which may be harmed by disclosure and not an objective determination of fact. *Torres v. Attorney General*, 391 Mass. 1, 9 (1984). The Supreme Judicial Court has stated that "the public right to know should prevail unless disclosure would publicize 'intimate details' of a 'highly personal nature.' " *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 626 (1980). Although there is a strong public interest in the allocation of subsidized housing, this interest is outweighed by the strong privacy interests in the information requested. Disclosure of this information would reveal every aspect of the financial condition of the applicants. Further, the applicants had a genuine expectation of confidentiality in applying for the subsidized housing. The disclosure of this information is an unwarranted invasion of privacy as it would permit the identification of individuals as applicants for government housing benefits. Accordingly, the applications are exempt from disclosure under exemption (c).

SPR 83/199

Issue: Custodian sought an advisory opinion concerning the public record status of letters sent to the Board of Selectmen from town residents.

Held: Correspondence received by the Board of Selectmen is a public record under G.L. c.4, s.7(26) provided none of the statutory exemptions apply.

Rationale: G.L. c.4, s.7(26) broadly defines public records to include all documentary materials made or received by any board of the Commonwealth or of a political subdivision thereof. The letters are certainly documentary materials within the meaning of G.L. c.4, s.7(26). Correspondence is deemed received when it is delivered via first class mail or in hand. The Board of Selectmen constitutes a board of a political subdivision of the Commonwealth. Therefore, the letters received by the Board are public records provided, however, that none of the statutory exemptions apply. In those instances where no exemption applies, the provisions of G.L. c.66, s.10 govern and the letters are subject to mandatory disclosure.

Determinations

SPR 84/17

Issue: Custodian sought an advisory opinion on whether additional fees may be charged to recover the cost of reducing the size of a voter list which was too large for the copy machine.

Held: The maximum fee which may be charged is the twenty cents per page allowed pursuant to 950 CMR 32.06.

Rationale: The overriding emphasis of G.L. c.66, s.10 is to make as many government records as possible subject to ready access. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 436 (1983). Voter lists are public records subject to mandatory disclosure pursuant to G.L. c.54, s.108. Providing a reduced-size list enabling increased public access is merely providing the broad public access expected by the law. To charge a fee significantly higher than allowed by 950 CMR 32.06 woud act to curtail access to those members of the public with limited funds. This denial of access to voter lists through the assessment of excessive fees would frustrate the spirit of the law. The custodian may only charge copying fees up to the maximum twenty cents per page allowed.

SPR 82/211

Issue: Requester sought access to computer listings and monthly breakdowns of crimes committed in the city and a list of property stolen and later retrieved by the city police department.

Held: The monthly computer printouts are not exempt under exemption (f) and the list of property stolen and later recovered is not exempt under exemptions (c) and (f). The requested records are therefore subject to mandatory public disclosure pursuant to G.L. c.66, s.10(a).

Rationale: Public records are broadly defined to include "... all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics," G.L. c.4, s.7(26) (emphasis supplied). Therefore, the public records law applies to computer printouts. Exemption (f), the investigatory exemption, serves to protect legitimate law enforcement objectives by limiting the unwarranted disclosure of investigatory materials. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976). The computer printout is not a confidential investigative technique. Rather, the printout is essentially a routine monitoring of criminal activity regularly compiled by the police which is not focused on a particular investigation. As such, the printout is not exempt under exemption (f). See *Reinstein v. Police Commissioner of Boston*, 378 Mass. 281, 290-292 (1979). Further, the disclosure of a list of property stolen and later recovered is unlikely to prejudice law enforcement objectives outlined in *Bougas*. Also, disclosure would serve the public interest by opening to public scrutiny the effectiveness of the police in recovering stolen property. Thus, exemption (f) does not apply to the list of stolen property.
Exemption (c), the privacy exemption, also doesn't apply because the list does not relate to specifically named individuals.

SPR 82/102

Issue: Requester sought access to a Department of Public Health statistical account of blood level PCB testing of area residents.

Held: The requested record is governed by G.L. c.111, s.24A, and is thus exempt from public disclosure through the operation of exemption (a).

Rationale: Exemption (a) exempts from public disclosure records which are "specifically or by necessary implication exempted from disclosure by statute." Disclosure of Department of Public Health studies conducted for the purpose of reducing morbidity and mortality is limited by G.L. c.111, s.24A. The statute requires that information, records, reports, statements, notes, memoranda and other data shall be confidential and not disclosed except as necessary for the furthering of the study or research project to which they relate. The statistical account requested was prepared as part of a research project by the Department of Public Health in accordance with G.L. c.111, s.24A. Therefore, the requested record falls within exemption (a) and is exempt from public disclosure.

SPR 83/194

Issue: Requester sought ballistics reports performed by State Police investigating a shooting death.

Held: The ballistics report is not exempt under exemption (f) and is subject to mandatory disclosure under G.L. c.66, s.10(a).

Rationale: Exemption (f), the investigatory exemption, provides a limited protection for those law enforcement activities that require a cloak of confidentiality to succeed. *Bougas v. Chief of Police of Lexington,* 371 Mass. 59, 62 (1976). This exemption, however, does not provide a blanket exemption for all investigatory materials. Instead, it invites a case-by-case consideration of whether access "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." *Reinstein v. Police Commissioner of Boston,* 378 Mass. 281, 289 (1979). The contents of all three portions of the ballistice report are essentially factual. There is no evidence that disclosure of this information will prejudice the possibility of effective law enforcement. The material contains no confidential investigative techniques or procedures. Further, as the investigation has been closed, there cannot be a premature disclosure of the Commonwealth's case. Therefore the ballistics report is not exempt from public disclosure under exemption (f).

Determinations

SPR 84/15

Issue: Custodian sought an advisory opinion on the proper fees that may be charged for copies of a Sales Comparable book, which had been compiled on the custodian's own initiative.

Held: The maximum fee for photocopies of the Sales Comparable book is twenty cents per page.

Rationale: The Public Records Access Regulations, 950 CMR 32.06, sets out the appropriate fees that may be charged for copies of public records. Under this section, the fee to be charged for photocopies of public records shall not exceed twenty cents per page. Further, it may be inferred from the regulations that additional fees may not be charged for the creation of a record. 950 CMR 32.03. Under G.L. c.4, s.7(26), once a record is "made" by an agency, it is a public record unless one of the enumerated exemptions is found to apply. The Sales Comparable data is a public record. See *Attorney General v. Board of Assessors of Woburn*, 375 Mass. 430 (1978). Therefore, since the book itself is a public record and because there had been no specific request for such a record by a member of the public, no additional fees may be charged to recover the costs incurred in compiling the sales comparable information into a book format.

SPR 84/77 and 84/79

Issue: Requester sought police investigation reports.

Held: The names and addresses of witnesses and informants are exempt from disclosure by exemption (f), the investigatory materials exemption. However, segregable non-exempt portions of a public record are subject to mandatory disclosure, G.L. c.66, s.10.

Rationale: The Supreme Judicial Court has stated that one of the purposes of exemption (f) is to encourage individual citizens to come forward and supply information to the police concerning matters under investigation. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976). The disclosure of information which would reveal the identities of those who were interviewed by the police may effectively inhibit others coming forward in the future. Therefore, the names and addresses of the witnesses found in the reports fall within the confines of exemption (f). As such this information is not a public record and is exempt from mandatory disclosure under G.L. c.66, s.10.

However, exemption (f) is not a blanket exemption. Therefore, segregable non-exempt portions of a public record are subject to mandatory disclosure. *Reinstein v. Police Commissioner of Boston*, 378 Mass. 281, 193 (1978).

SPR 83/62

Issue: Requester sought a water contamination study conducted on behalf of a city's Board of Health.

Held: Portions of the survey which make specific recommendations and conclusions are exempt through exemption (d). However, exemption (d) does not apply to those portions which are purely factual. Further, the survey is not exempt under exemption (f). Thus, the survey is subject to mandatory public disclosure except for the portions exempt under exemption (d).

Rationale: The purpose of exemption (d) is to provide a limited executive privilege in the development of government policy. Its application is limited to those matters in which the author has a reasonable expectation of confidentiality, without which he or she would be unwilling to express ideas fully and completely. Exemption (d) applies only to data, or memoranda or letters found within the deliberative process. A document is part of the deliberative process in that it makes recommendations on legal and policy matters. *Vaughn v. Rosen*, 523 F.2d. 1136, 1144 (D.C. Cir. 1975). The survey does make specific recommendations and conclusions about water contamination, which might not have been so forthrightly made without an expectation of confidentiality. Accordingly, those portions of the survey are exempt from public disclosure under exemption(d).

Excluded from exemption (d) are purely factual matters which are used in the formulation of government policy positions. The exemption does not permit the withholding of factual material merely because it is placed in memorandum along with policy matters. See ***E.P.A. v. Mink***, 410 U.S. 73, 89, 93, S. Ct. 82 (1973). Segregable non-exempt material which is a public record must be disclosed, G.L. c.66, s.10(a). The survey is primarily a compilation of data from a study of a water source. These factual data are not exempt under exemption (d).

Exemption (f), the investigatory materials exemption, governs material compiled by a law enforcement body. Exemption (f) does not apply to the water contamination survey, which was commissioned by the Town Selectmen for use in potential litigation. There is no litigation exemption under G.L. c.4, s.7(26).

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THE REVIEW

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Looking back to July, 1983 and the first issue of *The Review*, I have come to realize what a significant impact this quarterly publication has had on records custodians and requesters. There are over 300 recipients of *The Review*: attorneys, school department personnel, government officials, members of the media and interested citizens have all found this publication useful. Many thanks should go to the legal staff of the Public Records Division for their fine efforts in preparing the determinations found here.

We hope you continue to benefit from *The Review*. Copies of the full text of each determination found in this issue may be obtained from the Public Records Division, as well as further information on the public records law. We appreciate your interest in public records access.

Sincerely,

James W. Igoe,
Supervisor of Public Records

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SPR 84/136

Issue: Requester sought an advisory opinion on whether a Board of Assessors could allow its cerfied public accountant to inspect abatement applications.

Held: Abatement applications are exempt from disclosure by virtue of exemption (a).

Rationale: G.L. c.59, s.60, operating through exemption (a), prevents the disclosure of abatement applications pursuant to G.L. c.66, s.10. Therefore such applications are not public records. However, the fact that these applications are not public records does not necessarily mean that the Board of Assessors can't allow its certified public accountant to inspect them. It merely means that it can't allow such inspection pursuant to G.L. c.66, s.10. The certified public accountant may have rights under statutes other than the public records law to inspect the abatement applications.

SPR 84/72

Issue: Requester sought an advisory opinion on the public record status of the names and addresses of individuals who paid for an individualized bacteriological and chemical water supply analysis by a health department resulting in a determination that their well water was contaminated with nitrates.

Held: Access must be granted. Exemption (c) of G.L. c.4, s.7(26) does not apply to the requested information.

Rationale: Exemption (c) protects against unwarranted invasions of privacy. A balancing test between the public interest in disclosure and the possible privacy invasion was applied. The privacy interest will prevail only if disclosure would publicize "intimate details of a highly personal nature." *Attorney General v. Collector of Lynn,* 377 Mass. 151, 157 (1979). The information requested related to physical characteristics of an individual's residence. Data on the characteristics of homes have been held to be public records. For instance, field assessment cards which contain detailed information on the physical characteristics of homes are public records. *Attorney General v. Board of Assessors of Woburn,* 375 Mass. 430 (1978). Similarly, complaints, inspection reports and correspondence regarding housing code violations have been determined to be public records. *Cunningham v. Health Officer of Chelsea,* 7 Mass. App. Ct. 861 (1979). Furthermore, in *Robles v. Environmental Protection Agency,* 484 F.2d. 843 (4th Cir. 1973), it was determined that the cognate federal privacy exemption, 5 U.S.C. s.552(b)(6) did not prevent the release of the names and addresses of homeowners from a study of radiation levels in certain homes. Moreover, the contents of the requested records can be found in other public records, such as street lists or field assessment cards. Accordingly, exemption (c) does not apply.

SPR 84/52

Issue: The requester appealed the failure of the Department of Public Safety to grant access to records held by the State Police which are used for the collection of intelligence data.

Held: The records are not exempt from disclosure under exemptions (b) or (f) of G.L. c.4, s.7(26).

Rationale: The records sought consist of two forms: the first (CRM-1-76), is a procedural guide for the proper completion of the second (SP-195), which is a blank card upon which intelligence data is transcribed. Exemption (b) precludes the disclosure of internal rules and practices of a governmental unit, where proper performance of necessary governmental functions requires withholding of this information. This exemption is only applicable to "internal" data or that which the public "could not reasonably be expected to have an interest in." *Department of the Air Force v. Rose*, 452 U.S. 352, 369 (1976). There is a strong public interest in knowing that law enforcement officials are properly performing their duties. Moreover, there has been no showing that disclosure would impede the proper performance of law enforcement activities.

Exemption (f), the investigatory exemption, is also not applicable. Exemption (f) serves to protect those law enforcement activities requiring a cloak of confidentiality. In all cases, a law enforcement official must be able to demonstrate with specificity the possibility of prejudice to a specific investigation. *Reinstein v. Police Commissioner of Boston*, 378 Mass. 281, 290-292 (1979). Forms SP-195 and CRM-1-76 are used as a matter of routine and do not contain confidential investigatory techniques. These forms are used for all investigations conducted by the State Police. Since they do not focus on any one specific investigation, they do not fall within exemption (f).

SPR 84/159

Issue: Requester sought access to the name of an MBTA employee who possessed a certain badge number.

Held: The name is a public record which must be disclosed pursuant to G.L. c.66, s.10.

Rationale: The second clause of exemption (c) requires that the public interest in disclosure be balanced against the privacy interest. The privacy interest will prevail only when disclosure would publicize an "intimate detail of a highly personal nature." *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 625 (1980). In *Hastings & Sons Publishing Co. v. City Treasurer of Lynn*, 374 Mass. 812, 818, the court ruled that the names, addresses and earnings of public employees are public records. Moreover, the names of persons employed by the Commonwealth are statutorily public pursuant to G.L. c.7, s.30.

Determinations

SPR 84/125

Issue: Requester sought an advisory opinion on whether a record custodian has the perogative to require a written request, when in its determination there exists substantial doubt as to whether the records requested are public, and/or there exists substantial uncertainty as to what specific document or documents are being requested.

Held: The record custodian may not require a written request from record requesters.

Rationale: The provisions of 950 CMR 32.05 provide the basic framework under which the record requester and record custodian must operate. This section provides the record requester with minimum rights of access which a record custodian must observe. As a result, a record custodian may not establish procedures which infringe upon these rights. 950 CMR 32.05(3) clearly vests the decision whether to employ an oral or written public records request within the record requester alone. If a requester's description is vague, any ambiguity may be resolved by a request for clarification from the requester.

Therefore, record custodians may not require a request for public records to be in writing. Both oral and written requests are acceptable forms for access request under the public records law.

SPR 84/51

Issue: Requester appealed the failure of the Division of Industrial Accidents to provide access to copies of employer and employee records concerning a specific individual.

Held: Exemption (c) is applicable to portions of this information and the remaining portions are public information.

Rationale: Exemption (c) guards against unwarranted invasions of personal privacy. Under the first clause of exemption (c), all medical information such as medical reports and hospital records are clearly protected from disclosure. *Globe Newspaper Co. v. Boston Retirement Board,* 388 Mass. 427, 438 (1983). Transcripts of doctors' testimony would also be protected from disclosure as medical information. However, the second clause of exemption (c) governs the remaining information in the file. This clause requires a balancing of the employees' privacy interest in non-disclosure against the public's interest in knowing how the division functions. In order for the privacy interest to prevail, the data must constitute "intimate details of a highly personal nature." *Attorney General v. Assistant Commissioner of the Real Property Department of Boston,* 380 Mass. 623, 626 (1980). Disclosure of an employee's name, address, age, marital status and family situation is information in which the employee has a legitimate privacy interest. *Op. Atty. Gen.,* October 14, 1977. The privacy interest in this type of information outweighs the public interest in knowing this information and therefore it is exempt from disclosure. However, the information relating to the injured employee's employer such as business name, location and the type of business conducted is not exempt from disclosure pursuant to G.L. c.66, s.10, providing that any personal identifying information concerning the employee is segregated from the employer's records before disclosure.

SPR 84/110

Issue: Requester appealed the failure of the Board of Fisheries and Wildlife to provide her with a record of how each member of the Board voted on a specific issue.

Held: The roll call vote is a public record required to be maintained in session minutes pursuant to G.L. c.30A, s.11A and G.L. c.66, s.5A.

Rationale: G.L. c.66, s.5A requires boards and commissions to record the exact votes and other official actions that they take. The Open Meeting Law, G.L. c.30A, s.11A requires state boards to maintain records of its meetings including, among other things, the actions taken at such meetings. The dominant purpose of these provisions and that of the public records law is to open up the inner-workings of government to the scrutiny of the governed.

SPR 83/116

Issue: The Department of Social Services requested an advisory opinion on the public records status of salary information it received from a non-profit day nursery that received eighty percent of its funding from the Department of Social Services.

Held: The salary information is exempt from disclosure by exemption (c), the privacy exemption.

Rationale: Exemption (c) requires that an individual's privacy interest be balanced against the public interest in disclosure. Generally, salary information constitutes intimate personal financial data. See *Attorney General v. Collector of Lynn*, 377 Mass. 151, 157-58 (1979). The exception to this rule is salary information of persons employed in the public sector. See *Hastings & Sons Publishing Company v. City Treasurer of Lynn*, 374 Mass. 812 (1978). Therefore the salary information of the nursery's employees is public only if the nursery is a governmental agency.

In *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 436 A.2d. 266 (1980), the Connecticut Supreme Court identified the following four criteria used by the federal courts to determine whether an entity is a governmental agency:

1) whether the entity performs a governmental function;
2) the level of government funding
3) the extent of government involvement or regulation; and
4) whether the entity was created by the government.

The nursery is not a government agency. It was not created by the government, nor does it perform a governmental function. On the other hand it is regulated by a state agency, the Office for Children, and it received substantial funding from the Department of Social Services. However, since it has no authority to make decisions for the Department of Social Services, it cannot be considered the equivalent of a governmental agency. See *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523, 527 (S.D.N.Y. 1977). Therefore since the nursery is not the equivalent of a governmental agency, the salary information of its employees is exempt from disclosure by exemption (c).

Determinations

SPR 84/142

Issue: Requester, a business entity, appealed the failure of a Board of Assessor's Office to permit access to certain field assessment cards.

Held: Field assessment cards are clearly public records. *Attorney General v. Board of Assessors of Woburn,* 375 Mass. 430 (1978).

Rationale: The requested field assessment cards are unquestionably public records as defined by G.L. c.4, s.7(26). *Attorney General v. Board of Assessors of Woburn,* 375 Mass. 430 (1978). In addition, the fact that an individual has a commercial motive in requesting access to public records is not a sufficient reason to justify the nondisclosure of a public record. *Bougas v. Chief of Police of Lexington,* 371 Mass. 59, 64 (1976). See also *Direct Mail Service v. Registrar of Motor Vehicles,* 296 Mass. 353, 356 (1937). Accordingly, since the field assessment cards are public records, they must be made available to anyone upon request regardless of whether the individual seeking access is a real estate agent, appraiser or the actual homeowner.

SPR 84/139

Issue: Requester sought access to complaint letters regarding employees of a town landfill.

Held: The identities of the persons complained about are exempt from disclosure by exemption (c). The names, addresses and telephone numbers of the complainants are exempt by virtue of exemption (f).

Rationale: The second clause of exemption (c) applies to the identities of the employees complained about. This exemption requires that the public interest in disclosure be balanced against the privacy interest. The privacy interest prevails only when disclosure would publicize "intimate details of a highly personal nature." *Attorney General v. Assistant Commissioner of the Real Property Department of Boston,* 380 Mass. 623, 625-26 (1980). Disclosure of the employees' identities would have an adverse effect on their standing in the community, their ability to function in their present jobs, and their future employment opportunities. See *Reinstein v. Police Commissioner of Boston,* 378 Mass. 281 (1979). The public has an interest in how public employees discharge their official duties. This interest can be served by disclosing the nature of the complaint, without disclosing the identities of the persons complained about.

Exemption (f) provides protection for law enforcement activities that require confidentiality to succeed. One of its purposes is to encourage citizens to come forward and supply information. See *Bougas v. Chief of Police of Lexington,* 371 Mass. 59, 62 (1976); *Reinstein,* 378 Mass. at 289 (1972). Since disclosure of the identities of the complainants may inhibit persons from making complaints, such information is exempt from disclosure by exemption (f).

SPR 84/151

Issue: The requester sought an advisory opinion on the public record status of a written complaint by a Town Board of Selectmen giving their reasons for adopting a resolution of removal against the Town Manager. The Board has not yet held a formal removal hearing on the allegations contained in the complaint.

Held: The written complaint is exempt under G.L. c.4, s.7(26)(c) prior to a public hearing and the ultimate resolution of the Board's allegations.

Rationale: Exemption (c) requires the use of a balancing test between the public and private interests. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston,* 380 Mass. 623, 626 (1980). While the manner in which public employees conduct themselves while discharging their official duties is of legitimate concern to the tax-paying public, the allegations contained in the complaint are not proven fact. The complaint neither exonerates the official nor does it conclusively establish misconduct. Therefore, the premature disclosure of the unresolved allegations contained in the removal complaint could prove to be highly embarrassing and possibly humiliating to the Town Manager. Moreover, there is the danger that disclosure at this time could tarnish the Town Manager's reputation within the community and it could have the potential for adversely affecting his opportunity for future employment within both the public and private sectors. Accordingly, the Town Manager's privacy interests outweigh the public interest in disclosure prior to a public hearing and the ultimate resolution of the allegations.

SPR 84/133

Issue: Requester appealed the failure of a County Treasurer's Office to provide him with the endorsement signatures on the backs of county treasurer's checks.

Held: The information is public. Exemption (c) is not applicable.

Rationale: Exemption (c) guards against unwarranted invasions of privacy. The public interest in disclosure was balanced against the privacy interest. In order for the privacy interest to prevail, the data must constitute "intimate details of a highly personal nature." *Attorney General v. Assistant Commissioner of the Real Property Department of Boston,* 380 Mass. 623, 626 (1980). The privacy interest is not strong. The Supreme Judicial Court has recognized that public employees have less of an expectation of privacy than ordinary citizens. *Hastings & Sons Publishing Company v. City Treasurer of Lynn,* 374 Mass. 812 (1978). Also, since the validity of a check depends upon the genuiness of the signature, there is a strong public interest in assuring that government checks are not endorsed by unauthorized signatures. *MBTA Employees Credit Union v. Employers Mutual Insurance Company of Wisconsin,* 374 F. Supp. 1299, 1302 (D. Mass. 1974). However, any further notations on the back of cancelled paychecks, other than the payee's signature, such as account numbers and endorsements to other individuals by the payee, fall within the privacy exemption, G.L. c.4, s.7(26)(c).

Determinations

SPR 84/115

Issue: The requester appealed the failure of a fire department to disclose his employment application, medical examination, references and interview comments.

Held: Exemption (c) does not apply; thus the records must be released to the requester.

Rationale: Exemption (c), the privacy exemption, does not provide a blanket exemption against disclosure. However, the Massachusetts Supreme Judicial Court has held that "...medical and personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." *Globe Newspaper Co. v. Boston Retirement Board,* 338 Mass. 427, 438 (1983). Thus, it appears that the employment application, references and interview comments are exempt from disclosure. Yet a statute designed to ensure privacy and confidentiality with respect to an individual's records is not violated by the disclosure of records to the individual who is the subject of such records. *Crooker v. Foley,* No. 33785 (Mass. Superior, Suffolk, Feb. 28, 1980). Since the requester sought access to his own medical and personnel records, there can be no invasion of privacy resulting from disclosure of these records.

SPR 83/191

Issue: Requester sought a determination as to whether a police department budget which specifies the amounts allotted to individual programs and units is a public record within the meaning of G.L. c.4, s.7(26).

Held: Yes. The budget is not exempt from disclosure by exemption (d) and therefore is a public record.

Rationale: The purpose of exemption (d) is to provide a limited executive privilege to government officials. It serves to encourage the candid and open exchange of ideas relating to the development of government policy. It applies only to data, or memoranda or letters found within the deliberative process. In order for a document to be part of the deliberative process it must make recommendations or express opinions on legal or policy matters. *Vaughn v. Rosen,* 523 F.2d. 1136, 1144 (D.C. Cir. 1975).

The second clause of the exemption expressly does not include factual matters used in the formulation of policy positions. The exemption covers documents which reflect the personal opinions of the writer rather than the adopted policy of the governmental body. *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d. 854, 866 (D.C. Cir. 1980). Police budgets can be described as factual reports reflecting the adopted fiscal policy decisions made by the municipality. A budget showing the projected allocation of funds for a department is precisely the type of reasonable completed factual report which is not protected from disclosure by the express language in the second clause of exemption (d).

SPR 84/102

Issue: Requester sought access to a microfiche containing the names, addresses and descriptions of persons licensed to operate motor vehicles. The Registry of Motor Vehicles was only willing to give him this information in paper form although it was also maintained on microfiche.

Held: The microfiche is a public record pursuant to G.L. c.90, s.30 and G.L. c.4, s.7(26).

Rationale: G.L. c.90, s.30 requires the Registrar of Motor Vehicles to maintain a record of licenses to operate motor vehicles for public inspection. Therefore this information is a public record. The fact that the data is maintained on microfiche does not make a difference because the definition of public records includes all data "regardless of physical form or characteristics." G.L. c.4, s.7(26). As a public record the microfiche is subject to the mandatory disclosure provisions of G.L. c.66, s.10. Therefore, the requester must be provided with a microfiche copy upon payment of a reasonable fee. Pursuant to 950 C.M.R. 32.06(f), the actual cost incurred in making a duplicate of the microfiche may be assessed.

SPR 84/91

Issue: Requester sought access to a letter which outlined certain decisions made by the Parole Board and also contained allegations of possible misconduct by certain Parole Board members.

Held: The letter is exempt from disclosure pursuant to exemptions (a) and (c).

Rationale: The portion of the letter which outlines Parole Board decisions is exempt from disclosure by G.L. c.6, s.172 operating through exemption (a). G.L. c.6, s.172 prohibits the unauthorized disclosure of criminal offender record information (CORI). CORI includes all data compiled by a criminal justice agency which relates to an identifiable person concerning the nature or disposition of a criminal proceeding. The decisions of the Parole Board contain all the elements of CORI, thus they are not public records.

The remainder of the letter is exempt from disclosure by the second clause of exemption (c) which requires that the public right to know be balanced against the privacy interest. Exemption (c) may only be applied when disclosure would publicize "intimate details of a highly personal nature." *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 625-26 (1980). Although the public has an interest in how public officials conduct themselves while discharging their official duties, this interest is outweighed by the harm disclosure would cause. Disclosure of allegations of serious misconduct could prove to be highly embarrassing and so tarnish these officials' reputations so as to adversely affect any future employment opportunities. See *Attorney General v. Collector of Lynn*, 377 Mass. 151, 157 (1979). Moreover, these allegations have not been subject to final administrative or judicial review. Absent a conclusive resolution of these allegations, they constitute intimate details of a highly personal nature and are therefore exempt from disclosure by exemption (c).

Determinations

SPR 84/155

Issue: Requester sought an advisory opinion on the public record status of the bids submitted for a workers compensation insurance contract subsequent to the awarding of the contract.

Held: Exemption (h) is not applicable to the information.

Rationale: Exemption (h) exempts bids and proposals from disclosure only until the bids or proposals have been opened or until the time for submitting them has expired. The purpose of the exemption is to protect the integrity of the bidding procedure by keeping all bidders and potential bidders on an equal footing. In this case not only is the bidding process over, the contract has been awarded. Therefore, exemption (h) has no applicability to the requested record and it is not subject to the disclosure provisions of G.L. c.66, s.10.

SPR 84/43

Issue: The requester appealed the failure of the Board of Appeal on Motor Vehicle Liability Policies and Bonds to provide him with access to the Findings and Orders concerning a specific insurance company for the year 1981.

Held: The information requested is public. Exemption (a) and exemption (c) are not applicable to the requested information.

Rationale: Exemption (a) includes information that is exempt by statute. The statute asserted by the custodian is G.L. c.6, s.183 which governs the Motor Vehicle Insurance Merit Rating Board. The statute which governs the Board of Appeal is G.L. c.26, s.8A, and there is no express or implied confidentiality provision in G.L. c.26, s.8A. Therefore exemption (a) is not applicable to information maintained by the Motor Vehicle Insurance Merit Rating Board.

Exemption (c) guards against unwarranted invasions of privacy. A balancing test between the public interest in disclosure and the privacy interest was applied. In order for the privacy interest to outweigh the public interest, the data must constitute "intimate details of a highly personal nature." *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 626 (1980). Disclosure of the Findings and Orders of the Board of Appeal will not reveal intimate details of a highly personal nature. The only items pertaining personally to the claimant are the name and license number of the claimant. That information is specifically made public by statute, G.L. c.90, s.30. It is not, therefore, the kind of information that the individual would not reveal to strangers nor does it constitute information of an embarrassing nature. *Rural Housing Alliance v. United States Department of Agriculture*, 498 F.2d. 73 (1974). Therefore, exemption (c) is not applicable to the Findings and Orders of the Board of Appeal on Motor Vehicle Liability Policies and Bonds. Thus, the requested record is a public record subject to disclosure pursuant to G.L. c.66, s.10.

SPR 84/123

Issue: Requester sought access to the following:
1) a suicide note acquired pursuant to a search warrant;
2) a list of visitors to a person in prison; and
3) grand jury transcripts and exhibits.

Held: The suicide note is exempt from disclosure by exemption (c). Exemption (a) applies to the list of visitors to a prisoner while in prison and exemption (f) applies to the grand jury transcripts and exhibits.

Rationale: The second clause of exemption (c), which requires a balancing of the public interest in disclosure against the privacy interest, applies to the suicide note. This exemption applies only when disclosure would publicize "intimate details of a highly personal nature." *Attorney General v. Assistant Commissioner of the Real Property Department of Boston,* 380 Mass. 623, 625-26 (1980). By its very nature, a suicide note constitutes an intimate detail of a highly personal nature, and thus it is exempt from disclosure by exemption (c).

The list of visitors constitutes CORI (criminal offender record information), which is defined by G.L. c.6, s.167 as all data compiled by a criminal justice agency, which relates to an identifiable person and concerns the nature or disposition of a crime. G.L. c.6, s.172, operating through exemption (a), prohibits the disclosure of CORI to the public.

Exemption (f), the investigatory exemption, provides protection for law enforcement activities that require confidentiality to succeed. One of its purposes is to encourage citizens to come forward and speak freely with law enforcement officers concerning matters under investigation. See *Bougas v. Chief of Police of Lexington,* 371 Mass. 59, 62 (1976); *Reinstein v. Police Commissioner of Boston,* 378 Mass. 281, 289 (1972). The grand jury is an investigatory entity. Its proceedings have traditionally been secret so as to encourage witnesses to step forward and testify without fear of retaliation. *United States v. Proctor & Gamble,* 356 U.S. 677, 682 (1958). Although the public interest in secrecy is reduced once the criminal proceedings generated by the grand jury have been concluded, it is not completely eliminated. The United States Supreme Court has recognized that the need for secrecy continues even after the grand jury has concluded its operations. *Douglas Oil Co. v. Petrol Stops,* 441 U.S. 211 (1979). Since disclosure of the grand jury material may inhibit persons from coming forward with information relating to a matter before the grand jury, such material is exempt from disclosure by exemption (f).

Determinations

SPR 84/47

Issue: The Division of Insurance sought an advisory opinion on the public record status of records generated in the course of a market conduct survey of an insurance company, by that company's attorney.

Held: The working papers were received by the Division of Insurance, therefore they are public records pursuant to G.L. c.4, s.7(26).

Rationale: G.L. c.4, s.7(26) broadly defines public records to include all "materials or data regardless of physical form or characteristics, **made or received** by any officer or employee of any agency... ."(Emphasis added). The requirement that a record must be "made or received" by an agency is easily met. The Division of Insurance has physical possession of the records. The fact that the attorney who generated these records may have a proprietary interest in them does not preclude them from being public records. A record's status as public does not extinguish the author's proprietory interest in such records. See *Wood v. Skene*, 347 Mass. 351, 361 (1964) where it was held that the filing of architectural plans with a building permit (which is a public record) is not a general publication so as to terminate an architect's common law copyright rights where he had expressly retained all property rights. Therefore, the attorney's proprietary interest does not affect the public record status of these records.

SPR 84/118

Issue: Custodian sought an advisory opinion on the public record status of absentee ballot applications filed with the city or town clerk's office during the period before an election.

Held: With the exception of information relating to a physical disability, such absentee ballot applications are public records.

Rationale: Much of the information contained on these applications are public records by virtue of various statutes. The name and addresses of all certified absentee voters are public records. G.L. c.54, s.91. Pursuant to G.L. c.51, s.55, the party affiliation of registered voters is public, as well as their names and addresses.

The only information contained on absentee ballots that is not public is the fact that an individual has a physical disability. Exemption (c), the privacy exemption, is applicable to this information. Exemption (c) calls for a balancing of the public's right to know against the privacy interest of the individual. The privacy interest will prevail only when disclosure would publicize "intimate details of a highly personal nature" such as an individual's medical condition. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston,* 380 Mass. 623, 626 (1980). Since the fact of physical disability relates to a person's medical condition, disclosure of this fact would constitute an unwarranted invasion of privacy. Therefore, this information is exempt from disclosure by exemption (c).

SPR 83/205

Issue: Requester sought access to a report on the investigation of a town's Public Safety Department.

Held: Portions of the report are exempt from disclosure pursuant to exemptions (c), (d) and (f) of G.L. c.4, s.7(26).

Rationale: The first clause of exemption (c) exempts from disclosure personnel and medical files of a personal nature relating to a specific individual. *Globe Newspaper Co. v. Boston Retirement Board,* 388 Mass. 427, 432-34 (1983). The report is not personnel information in that it is not an evaluation of a particular individual but rather of the department as a whole. See *Athens Observer, Inc. v. Anderson*, 263 S.E.2d. 128 (GA 1980). Therefore the first clause of exemption (c) is not applicable.

The second clause of exemption (c) requires a balancing of the public's right to know against the privacy interest that would be invaded by disclosure. The privacy interest will prevail only when disclosure would publicize "intimate details of a highly personal nature." *Attorney General v. Assistant Commissioner of the Real Property Department of Boston,* 380 Mass. 623, 625-26 (1980). Since family fights and reputation were cited in *Attorney General v. Assistant Commissioner of the Real Property, Supra,* as an example of an "intimate detail," the portions of the report that identify individuals who were having family problems are exempt from disclosure. The report contains specific allegations of misconduct, which if disclosed could have an adverse effect on the ability of certain individuals to function in their present positions as well as on their ability to obtain future employment. See *Attorney General v. School Committee of Northampton,* 375 Mass. 121, 132, n.5 (1979). The investigation of these allegations has not resulted in any charges being brought. The federal courts have generally found that matters relating to unproven allegations of misconduct by government officials are exempt from disclosure by the privacy exemption. See *Vaughn v. Rosen,* 384 F.Supp. 1049, 1055 (D.D.C. 1974), aff'd, 523 F.2d 1136 (D.C. Cir. 1975); *Fund for Constitutional Government v. National Archives and Records Service,* 485 F.Supp. 1, 16 (E.D. VA 1978). Accordingly, those portions of the report concerning the investigation of the allegations of misconduct are exempt from disclosure by virtue of exemption (c).

Exemption (d) provides a limited executive privilege for data relating to the development of government policy. To be included as part of the exempted deliberative process, the data must make recommendations or express opinions on legal or policy matters. *Vaughn v. Rosen,* 523 F.2d 1136, at 1144. Its application is limited to those matters in which the author has a reasonable expectation of confidentiality, without which he or she would be unwilling to express ideas fully and completely. Exemption (d) thus covers the personal opinions of the writer rather than the policy of the agency. *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980). Those portions of the report that contain the recommendations of the investigator fall within exemption (d).

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Exemption (f), the investigatory exemption, provides protection for those law enforcement activities requiring a cloak of confidentiality to succeed. One of its purposes is to encourage individuals to come forward and speak freely concerning matters under investigation. *Bougas v. Chief of Police of Lexington,* 371 Mass. 59, 62 (1976), cited with approval in *Reinstein v. Police Commissioner of Boston,* 378 Mass. 281, 289 (1979). Since disclosure of the identities of the individuals who provided information to the investigator may inhibit others from coming forward on the future, the identities of these persons are exempt from disclosure pursuant to exemption (f).

SPR 83/43

Issue: Requester appealed the failure of the Animal Rescue League of Boston to grant access to inspection reports of institutions that utilize animals for research purposes.

Held: The Animal Rescue League of Boston is not an entity, subject to the mandatory disclosure provisions of G.L. c.66, s.10, therefore the inspection reports are not public records.

Rationale: G.L. c.4, s.7(26) defines public records as all records made or received by an officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth, or of any subdivision thereof, or of any authority established by the general court to serve a public purpose. As a private non-profit corporation the Animal Rescue League (ARL) is not one of the governmental entities enumerated in G.L. c.4, s.7(26). However, if an entity functions as a government agency it may be subject to the provisions of the public records law. The federal courts have looked at the following factors in determining whether an entity is the functional equivalent of an agency:

1) whether the entity performs a governmental function;
2) the level of government funding;
3) the extent of government involvement or regulation; and
4) whether the entity was created by the government.

(*Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 436 A.2d. 266 (1980))

The ARL was not created by the government. It does not receive operational appropriations from the legislature, instead it receives its financial support almost entirely from private contributions. There is no state agency that directly regulates, supervises or oversees the day-to-day operation of the ARL. Although the ARL performs a government function it does not possess any decision making authority. G.L. c.49A, s.8A gives the ARL the authority to inspect institutions subject to Chapter 49A and make recommendations. The federal courts place great importance on whether an entity has the authority to make binding decisions in determining whether an entity is subject to the Federal Freedom of Information Act, 5 U.S.C. s.552(b). See *Lombardo v. Handler,* 397 F.Supp. 792 (D.D.C. 1975); *Washington Research Project, Inc. v. Department of Health, Education and Welfare,* 504 F.2d. 238, 247-48 (D.C.Cir. 1974). Since the ARL is not an agency as defined by G.L. c.4, s.7(26) it is not subject to the disclosure provisions of G.L. c.66, s.10.

The Review

Trends in Government Disclosure

Public Records Division
Office of the Massachusetts Secretary of State
Michael J. Connolly, Secretary

The
Review
Trends in Government Disclosure

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Office of the Secretary of State, Michael J. Connolly, Secretary

This special double issue of *The Review* adopts a new look. The tradition of providing custodians and requesters with a compendium of developments in the Public Records Law, however, is continued . I hope that the topics addressed in these determinations will assist you in formulating a response to any public records problem you may confront. This issue also includes a newly updated cumulative index of all determinations that have appeared in *The Review*. Acknowledgement should be given to the legal and support staff of the Public Records Division for their continued best efforts. Apologies are extended for the unavoidable publication delay.

The full text of each determination found within this issue may be obtained from The Public Records Division. Further inquiries regarding the Public Records Law are encouraged.

Sincerely,

James W. Igoe
Supervisor of Public Records

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SPR 918

Issue: Requester appeals the denial of access to a compliance manual prepared by a law enforcement agency.

Held: The plan is a public record, not falling within exemptions (b), (d), and (f).

Rationale: Exemption (d) prevents disclosure of records related to governmental policy development. The manual consists of directions to subordinates, not recommendations to policy makers. Accordingly, it does not fall within exemption (d).

Exemption (f) exempts confidential investigative records, the disclosure of which would unduly prejudice effective law enforcement. Exempt records must relate to specific investigations of alleged wrongdoing, but not to routine governmental monitoring. *Reinstein v. Police Commissioner of Boston,* 378 Mass. 281(1979). Enforcement manuals are prepared as part of the state role in carrying out the government grant program. The records are designed to instruct grant compliance officers on how to conduct a routine review of a grantee . Failure to comply with appropriate standards may result in remedies not involving civil or criminal penalties. These considerations indicate that the records are not of an investigatory nature and thus do not fall within exemption (f).

Exemption (b) exempts records related to internal practices of a governmental unit, the disclosure of which would significantly impede governmental operations. The exempt record must concern matters that are truly internal or intra-governmental and not of legitimate interest to the public. *Crooker v. Bureau of Alcohol, Tabacco, and Firearms,* 670 F. 2d. 1051 (D.C. Cir. 1981). None of the compliance manual records satisfy these requirements. The portions of the records that are intra-governmental would not jeopardize performance of governmental functions. Some of the records, being interpretations or modifications of the law, are not predominantly internal in nature. Other portions of the records would eventually be disclosed when the compliance officer implemented the plan. The remaining records do not meet the burden of proof sufficient for the application of exemption (b).

SPR 84/221

Issue: Custodian requested an advisory opinion regarding the public records status of the contents of abandoned property records held by the State Treasurer and Receiver General and an interpretation of the access regulations regarding these records.

Held: The records filed with the State Treasurer and Receiver General pursuant to G. L. c. 200A, s.7, with social security numbers deleted, become public records upon receipt and are subject to the mandatory disclosure provision of G. L. c. 66, s.10 and the Public Records Access Regulations, 950 CMR 32.00.

Rationale: The Abandoned Property Law, G. L. c. 200A, provides a method by which property classified as "abandoned " can be distributed to the rightful owner. The purpose of the statute is to prevent escheats. To this end, G. L. c. 200A, s.8(a)(1), requires the State Treasurer to publish the name and last known address of the apparent owner. G. L. c. 200A, s.8(c)(1), requires each published notice to contain a statement that information concerning the amount or description of the property and the name and address of the holder may be obtained by persons possessing an interest in the property by addressing an inquiry to the State Treasurer . By enacting these provisions, the Legislature determined that any privacy interest that could be harmed by disclosure of this information is minimal. On the other hand, there is a great public interest in the amount of abandoned property which annually escheats and in providing easy public access to the means and resources available for locating and returning the property to its rightful owner. Accordingly, G. L. c. 4, s.7(26)(c), does not exempt the name and the address of the apparent owner, the amount or description of the property involved, or the name and address of the holder. Disclosure of an apparent owner's social security number, however, serves no similar public interest and constitutes an unwarranted invasion of personal privacy. Access must be granted to any person, without regard to status or motivation, within ten days of receipt of a request. 950 CMR 32.00.

SPR 84/158, 216, 217, 218

Issue: The requester appeals the custodian's failure to disclose copies of federal grants for educational purposes, the number of students enrolled in R.O.T.C. programs and a breakdown of all school committee administration expenditures. The custodian was unwilling to comply with this request because he felt it was a "defamatory request ... lacking in good faith."

Held: A person's intended use or motive in regard to a request for access to a public record is irrelevant and should never become a consideration for a record custodian under the Public Records Law.

Rationale: G. L. c. 66, s.10(a) guarantees anyone a right of access to all public records regardless of the identity or motive of the individual seeking the record. See 950 C.M.R. 32.05 (5) (prohibiting background inquiries). The Massachusetts Supreme Judicial Court has stated that, G. L. c. 66, s.10 "... does not provide a 'standing' requirement but extends the right to examine public records to 'any person' whether intimately involved with the subject matter of the records he seeks or merely motivated by idle curiosity." *Bougas v. Chief of Police of Lexington,* 371 Mass. 59,64(1976); *see also, Torres v. Attorney General*, 391 Mass. 1, 10(1984).

SPR 84/219

Issue: Requester appealed the failure of a county treasurer to provide him access to the amounts and dates of monthly pension payments made to two named individuals.

Held: The information requested is public. Exemption (c) is not applicable.

Rationale: The public records status of pension payments is clearly settled. The dates and amounts of payments, as well as the names of pensioners, are not exempt from disclosure by G. L. c. 4, s.7(26)(c). *Globe Newspaper Company v. Boston Retirement Board,* 388 Mass. 427, 428-429 n. 6-7(1983). Accordingly, the dates and amounts of pension payments made to two named individuals are public records.

SPR 84/152

Issue: Requester sought access to an investment candidates list and a treasurer's report held by the Massachusetts Technology Development Corporation. (MTDC).

Held: The information requested is not public. Exemption (a) is applicable to the requested information.

Rationale: Exemption (a) applies to information that is exempt by statute. The statute asserted by the custodian is G. L. c. 40, s.10, as amended by c. 809 of the Acts and Resolves of 1979. This statute provides that trade secrets and commercial or financial information of an applicant or recipient of Massachusetts Technology Development Corporation assistance are not public records. Essentially, the statute preserves the confidentiality of trade secret information and commercial or financial information. In analogizing this statute to the federal exemption for trade secret and commercial or financial information, the following objective test is utilized to determine if the information is privileged or confidential: whether disclosure would have the effect of (1) impairing the government's ability to obtain the necessary information in the future; or (2) causing substantial harm to the competitive position of the person from whom the information was obtained. *National Parks and Conservation Association v. Morton,* 498 F.2d 765, 770 (D.C. Cir.1974) . The records requested contained information pertaining to specific companies as to their respective debt balances on loans from the MTDC revolving loan fund, equity amounts invested by the MTDC and the interest received by the MTDC. The records also contain a list of all companies who were denied MTDC assistance.

This information would reveal the credit line and the fiscal solvency of the companies, thus causing substantial harm to their competitive positions. Additionally, disclosure would impair the government's ability to obtain information essential to the MTDC assistance program.

SPR 84/156

Issue: Requester sought police department records which included: a civil service list of police applicants; names of those accepted for police positions from that list; the names of those on the list who are currently working for the department; a copy of a contract between the town and an individual hired to perform psychological testing of applicants; certain miscellaneous data associated with this testing; and a letter from the Personnel Administrator of the Division of Personnel Administration delegating to the town the authority to conduct this testing.

Held: All the requested data were public records subject to disclosure.

Rationale: Civil service eligibility lists are public record by statute. G. L. c. 31, s.25. Likewise, names of public employees have been consistently held to be public records in prior determinations by the Supervisor of Public Records. SPRS 84/159, 83/27 and 82/172.

Certain municipal contracts are statutorily defined as public records by c. 66, s.17B. Although the legislature repealed c. 66, s.17B in 1973, the Supreme Judicial Court has held that records which were public prior to the enactment of the current definition of a public record remain public under St. 1973, c. 1050, s.6. *Hastings and Sons Publishing Co. v. City Treasurer of Lynn*, 374 Mass 812, 816 (1978). Therefore, the contract is a public record.

In examining the public records status of the miscellaneous data relating to the conducting of the psychological testing for police applicants, exemption (d) of G. L. c. 4, s.7(26) was considered. This exemption applies only to data or memoranda determined to be within the deliberative process and it expressly does not include purely factual reports or ones which are reasonably complete. *E.P.A. v. Mink*, 410 U.S. 73, 89; 93 S. Ct. 827, 837(1973). Under this analysis, the records were found to be factual in nature and thus not exempt from disclosure.

G. L. c. 31, s.5(1) grants to the cities and towns of the commonwealth the power to operate their own civil service systems under "plans" which are subject to the approval of the Personnel Administrator of the Division of Personnel Administration. Once a "plan" is approved, a letter of certification is issued to the town or city evidencing such approval. Here, it was found that none of the exemptions found within G. L. c. 4, s.7(26) were applicable. The letter was representative of adopted government policy and its disclosure can only serve the public interest.

SPR 1000

Issue: Requester appealed from the Department of Public Welfare's desision to deny access to records related to an ongoing civil case in which an order closing discovery was made. The Attorney General alleges that the unavailability of the record under the Rules of Civil Procedure precludes access to the record under the Public Records Law.

Held: Records unavailable through the discovery rules remain public records unless they fall within one of the exemptions to the public records law under G. L. c. 4, s.7(26).

Rationale: The discovery rules and the Public Records Law are two distinct avenues for gaining access to records, each with its own standard. Discovery of a record through the Rules depends on the circumstances of a particular lawsuit, especially on the needs of the party seeking the record. Access to a record pursuant to the Public Records Law rests on the content of the record regardless of the circumstances of the requester. *Bougas v. Chief of Police of Lexington,* 371 Mass. 59, (1976). In enacting G. L. c. 4, s.7(26) the Legislature considered, but ultimately rejected, an exemption for records pertaining to civil litigation involving a governmental agency. The federal courts have held that an agency can not rely on the Rules to withhold information from the public where the Freedom of Information Act (the federal counterpart to Massachusetts' Public Records Law) requires its disclosure. *Moore - Mc Cormack Lines, Inc. v. I.T.O. Corporation of Baltimore*, 508 F. 2d 945, 949 - 50 (4th Cir. 1974).

The Rules do not operate through exemption (a) to bar these records from disclosure. The Rules do not prohibit disclosure but instead provide for disclosure in certain circumstances. There is no conflict between the Public Records Law and the rules of discovery. When a government agency is a party to litigation, either or both routes may be used to obtain government records.

SPR 1032

Issue: The custodian sought an advisory opinion on the public records status of Department of Public Health records related to an investigation of a hepatitis outbreak at a hotel.

Held: Exemptions (a), (c), and (f) are not applicable to the records.

Rationale: Exemption (a) includes records that are exempt by statute. Departmentally sponsored scientific studies and research records shall be confidential and not admissible as evidence in any public proceeding. G. L. c. 111, s.24 A. The purpose of the investigation was to determine if there was a hepatitis outbreak at a specific site. It did not possess the basic academic research character appropriate for application of the statute. The records potentially could have been shared with the local Board of Health and used in a licensing hearing. This indicates that the department never intended the records to come within the statute. Accordingly, the statute and thus exemption (a) do not apply to the records.

To fall within exemption (c) a record must relate to a specific individual. Since these records do not relate to a specific individual, exemption (c) is not applicable.

In order for a record to fall within exemption (f), its disclosure must prejudice effective law enforcement. The exemption was designed to protect " confidential investigatory techniques, procedures or sources of information," and to encourage citzens " to come forward and speak freely with police concerning matters under investigation." *Reinstein v. Police Commissioner of Boston,* 378 Mass. 281, 289(1979). The hepatitis investigation used no confidential investigatory techniques. It generated records consisting entirely of factual, non-subjective information, and has resulted in no law enforcement activity. Additionally, G. L. c. 111, s s.109, 111, and 112 require citizens to report information concerning dangerous diseases. Accordingly, exemption (f) does not apply to these records.

SPR 1038

Issue: Requester sought Massachusetts State Lottery Commission records concerning the acquisition of an on-line number selection lottery processing system.

Held: The records are not exempt under exemptions (g) or (h) and are thus public records.

Rationale: Exemption (h) prevents disclosure of certain proposals and bids to enter into any contract or agreement and inter- and intra-agency evaluative communications related to these proposals and bids. Proposals and bids that must be opened publicly are disclosable from the time that they are to be opened. All other proposals and bids are disclosable once the deadline for their receipt has expired. The evaluative documents are disclosable from the time that the decision has been made to negotiate with or award a contract to a particular person. This exemption is designed to protect the integrity of the bidding procedure by keeping all bidders and potential bidders on an equal footing. It does not apply to records, such as the Commission records, in which the bidding procedure is over and the contract has been awarded.

Exemption (g) prevents disclosure of trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subparagraph shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit. The commission records were not voluntarily provided, but instead submitted as a condition of receiving a governmental contract. Additionally, the records were not used in the development of governmental policy, thus they do not fall within exemption (g). Since no other exemption applies, the records are public records.

SPR 85/41

Issue: The requester sought the Inspector General's case file on his investigation of the Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority.

Held: Inspector General investigation records are exempt from disclosure by virtue of G. L. c. 12A ss.10 and 13, operating through exemption (a).

Rationale: Exemption (a) includes records that are exempt from disclosure by statute. At the discretion of the Inspector General Council the Inspector General may refer investigatory findings to any gov-rnmental agency interested in the findings. G. L. c. 12A, s.13 provides that all records of the Inspector General shall be confidential and shall not be public records unless it is necessary for the Inspector General to make such records public in the performance of his or her duties. Both statutes express a legislative intent that records of the Inspector General not be disclosed, even given a strong public interest in disclosure. Therefore, the requested records fall within exemption (a) and are exempt from mandatory disclosure.

SPR 84/161

Issue: Requester sought access to certain records pertaining to state police reconstruction reports relating to an accident.

Held: The requested information is public except for the deletion of individual names and other identifying information by virtue of exemption (f)

Rationale: Exemption (f), the investigatory exemption, provides protection for those law enforcement activities requiring a cloak of confidentiality to succeed . One of its purposes is to encourage individuals to come forward and speak freely concerning matters under investigation. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62(1976). Since disclosure of the identities of the witnesses and nonwitnesses who provided information to the investigator may inhibit others from coming forward in future investigations, the identities of these persons are exempt from disclosure pursuant to exemption (f).

Furthermore, exemption (f) does not apply since the investigation is completed, thus there is no risk of premature disclosure of the Commonwealth's case.

SPR 84/140

Issue: Requester sought an advisory opinion on the public record status of records stored in computerized form and the extent to which a custodian must provide access thereto.

Held: A computer tape or disc is a public record insofar as the information it contains is public.

Rationale: The plain language of G. L. c. 4, s.7(26) demonstrates that the public record status of requested data is not dependent upon its physical form. If data is public, it is public in whatever form it may be found in. Additionally, the federal courts have held that the Federal Freedom of Information Act (upon which the Massachusetts Public Records Law is patterned) applies to computer tapes to the same extent it applies to other documents. *See Yeager v. Drug Enforcement Administration,* 678 F. 2d 315 (D. C. Cir. 1982); *Long v. IRS,* cert. denied, 446 U.S. 917 (1980).

As a public record, a computer tape or disc is subject to the mandatory disclosure provisions of G. L. c. 66, s.10. Thus the custodian of a computer disc or tape must provide a requester with a copy of it upon payment of a reasonable fee. Pursuant to 950 C.M.R. 32.06 (f) the custodian is entitled to collect, as a fee the actual cost involved in making a duplicate of the computer tape or disc.

If an agency does not have the necessary software (program) to generate a particular record, it is not obligated to create such software. *Seigle v. Barry,* 422 So. 2d 63 (Fla. App. 1982). However, if an agency has the software to generate the record requested then the agency would be required to provide access to such record pursuant to G. L. c. 66, s.10.

SPR 84/182

Issue: Requester appeals the Department of Public Welfare's failure to provide access to proposals, received in response to a request for proposals, evaluation instruments used in the selection process, meeting minutes and the name, title and employer of each member of the Selection Committee.

Held: The information is not exempt from disclosure by exemptions (c) and (h) and therefore is a public record.

Rationale: Exemption (c) does not apply to the personnel information requested of committee members since the minimal privacy invasion caused by disclosure does not outweigh the strong public interest which would be served by disclosure. Members voluntarily serve as selection committee members yielding only a minimal privacy expectation. Moreover, the public has a strong and compelling interest in seeing that selection committee members are staffed by competent personnel adequately discharging their duties.

Exemption (h) addresses the balance of the requested information. Proposals and bids to enter into any contract or agreement and any inter- or intra-agency evaluative communications related to these proposals and bids are temporarily exempt from disclosure. Proposals and bids that must be opened publicly are disclosable from the time that they are to be opened. All other proposals and bids are disclosable once the deadline for their receipt has expired. The evaluative documents are disclosable from the time that the decision has been made to negotiate with or award a contract to a particular person. In this instance, the department already had reached a decision to negotiate or contract with another person. Therefore, exemption (h) has no applicability to the requested records and they are subject to the disclosure provisions of G. L. c. 66, s.10.

SPR 84/215

Issue: Requester appealed the failure of a board of selectmen to provide him a "corrected copy" of selectmen meeting minutes. The requester believed that the transcribed minutes did not accurately reflect the contents of the tape recording of the meeting.

Held: Requester is not entitled to a verbatim transcript of the meeting minutes.

Rationale: The public records status of selectmen open meeting minutes is clearly established by the Open Meeting Law, G. L. c. 39 s.23B, which provides that, " A governmental body shall maintain accurate records of its meeting, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. The records of each meeting shall become a public record and be available to the public...." A tape recorder may be used to create a record of the business transacted at the meeting and to provide a basis for a subsequent transcription. The transcription must comply with the statutory directive, but there is no requirement that it be verbatim. Since the original transcription provided to the requester by the board of selectmen contained the statutorily required information, it satisfied the request for meeting minutes.

SPR 1031

Issue: Requester appealed the failure of a city to grant him access to a letter to the city from the State Ethics Commission.

Held: The State Ethics Commission's letter is exempt from mandatory disclosure by virtue of exemption (a).

Rationale: Exemption (a) applies to records specifically or by necessary implication exempted from disclosure by statute. Where a State Ethics Commission preliminary inquiry fails to indicate reasonable cause for belief that there has been a statutory violation, the inquiry shall be terminated. All records and proceedings from a terminated preliminary inquiry are confidential pursuant to G. L. c. 268, s.4. The letter to the city satisfies the statutory criteria for confidentiality. Accordingly, the letter falls within exemption (a).

SPR 82/132

Issue: An advisory opinion was sought on whether a municipality may delegate its public records responsibilities to a private entity.

Held: A governmental entity may delegate any of its public records access duties to an independent agent, but may not delegate the responsibility of insuring that the duties are carried out.

Rationale: Municipal departments must provide copies of public records within ten days of receiving a record request. G. L. c. 66, s.10. There is no requirement that the departments must perform this service themselves. They may delegate the work to private agents. However, they remain responsible for the delegated work. Also, delegation of work does not allow municipal departments to charge record requesters more than the legally permitted amount for copies of public records.

SPR 84/121

Issue: Requester sought an advisory opinion on the public record status of the Commonwealth's vital statistics records.

Held: Exemption (a) applies to illegitimate births, abnormal sex births, fetal deaths and marriage records of illegitimate persons or marriage records with a physician's certificate filed puruant to G. L. c. 207, s.20A, recorded after 1890. All other records of vital statistics are public records.

Rationale: Exemption (a) applies to information that is exempt by statute. G. L. c. 207, s.20A exempts from disclosure records of illegitimate births, abnormal sex births, fetal deaths and marriage records of illegitimate persons or marriage records with a physician's certificate recorded after 1890. Thus, these records are not public. However, effective September 28, 1983, all record copies and corrections of birth, marriage and death and the indices from 1841-1890 are statutorily public records pursuant to G. L. c. 46, s.2A.

SPR 84/46

Issue: Whether a municipal police department may charge a requester for time spent segregating, sanitizing and copying an internal investigation police report.

Held: No. The fee a municipal police department may charge for providing copies of public records is governed by G. L. c. 66, s.10(a).

Rationale: Although the Public Records Access Regulations, 950 CMR 32.06, permit a record custodian to charge a fee for search and segregation time which takes more than twenty minutes, these regulations do not apply to this case. The fee provisions contained in the regulations apply except where the fees have been prescribed by statute. The fees that a municipal police department may assess for providing copies of public records are prescribed by G. L. c. 66, s.10(a). It provides that a police department may assess a fee of one dollar per page for preparing and mailing reports and fifty cents per page for providing copies of public records in hand. Since G. L. c. 66, s.10(a) prescribes the fees a municipal police department may charge for these records, the fee provisions contained in the regulations are not applicable.

SPR 84/165

Issue: Requester sought access to a sociological thesis shown to a Board of Selectmen.

Held: The sociological thesis was not in the possession or control of a public official and , therefore , it is not a public record within the meaning of G. L. c. 4, s.7(26). Accordingly , G. L. c. 66, s.10 does not apply to the requested record.

Rationale: Public records are broadly defined to include all documents, regardless of physical form or characteristics, " made or received" by any officer or employee of any board or department of a political subdivision of the Commonwealth. G. L. c. 4, s.7(26). In addition, G. L. c. 66, s.10 requires that the official record custodian provide access to records in his or her possession which exist and are public as defined in G. L. c. 4, s.7(26). Since the record requested was not in the possession or control of a public official, it is not a public record.

SPR 84/25

Issue: The requester appealed a town's use of the attorney - client privilege, the attorney work product doctrine, and the requester's circumstances to justify denial of access to Board of Selectmen records.

Held: All of the town's reasons for preventing disclosure are improper. Exemptions (c) and (d) apply to portions of the records. The remainder of the records are public.

Rationale: Exemption (d) , unlike its federal counterpart, 5 U.S.C. s.552(b) 5, does not exempt records generated under the attorney - client privilege or the attorney work product doctrine. Since no other exemption applies to these legal concepts, they are irrelevant to the public records evaluation process.

Recommendations on legal and policy matters contributing to the deliberative process of governmental policy development are exempt from mandatory disclosure by exemption (d). *Vaughn v. Rosen*, 523 F.2d 1136, 1144(D.C. Cir. 1975). Factual matters used in this process are not exempt. *E.P.A. v. Mink*, 410 U.S. 73, 89, 93 S. Ct.82(1973). Additionally, records representing policies,statements or interpretations that have been adopted are not exempt. *Orion Research v. E.P.A.*, 615 F.2d. 551, 554 (1980). Accordingly, a portion of one of the records requesting a legal opinion from the town counsel concerning a town licensing policy falls within exemption (d) if policy on this matter has not yet been adopted.

The relation of an individual to the subject matter of a record the person is requesting is irrelevant in determining the person's access to the record. *Bougas v. Chief of Police of Lexington*, 371 Mass 59(1976). Also , the individual need not have a specific reason for desiring access to the record. *Id.*

The second clause of exemption (c) requires that the public's right to know be balanced against the privacy interest which may be harmed by disclosure. The public right to know should prevail unless disclosure would publicize intimate details of a highly personal nature. *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 625 (1980). An individual's medical record is an intimate detail, thus the portion of the board record that relates to an individual's medical condition is exempt from disclosure by exemption (c).

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SPR 84/25 (continued from previous page)

Since segregable, non-exempt materials which are public records must be disclosed, G. L. c. 66, s.10(a), all portions of all the board's records not exempt by exemption (c) or (d) are disclosable.

SPR 84/210

Issue: Custodian requested an advisory opinion on the public records status of tax commitment books.

Held: The tax commitment books are clearly public records. *Attorney General v. Collector of Lynn,* 377 Mass. 151(1979).

Rationale: The public records status of tax commitment books is well settled. *Attorney General v. Collector of Lynn,* 377 Mass. 151(1979). In the *Lynn* case, the court modified its earlier holding in *Hardman v. Collector of Taxes of North Adams*, 317 Mass. 439(1945), that tax commitment books were not public records under the more restric - tive, pre-1973 definition of public records. *Id.*, at 154. It was held that. G. L. c. 60, s.8, created an expedited inspection process for town officials and did not necessarily imply a statutory exemption under G. L. c. 4, s.7(26)(a). *Id.*, at 155. The court also recognized that the strong public interest in knowing whether the burden of public expenses is being equitably distributed and whether public employees are diligently collecting delinquent accounts outweighs the privacy exemption provided by G. L. c. 4, s.7(26)(c). Furthermore, it is improper to inquire into the requester's status or motivation when a request is made for inspection of tax commitment books.

SPR 83/88

Issue: Requester sought access to various records held by a local police department relative to a particular criminal incident. The records contained: a booking and arrest report; an intelligence report based on information derived from an informant; a police attendance report; a police log; the identities of officers present at the scene of an arrest; and the identification of a person who was the subject of a suspicious person report.

Held: The requested data is public with the exception of the identity of the subject of a "suspicious" person report.

Rationale: In determining the public records status of the requested data, exemptions (a), (c) and (f) were considered. Exemption (a), operating through G. L. c. 6, s.172 (CORI), allows for the non-disclosure of all data assembled by a criminal justice agency (i.e. police) which refer to a specific individual who is the subject of a criminal charge. G. L. c. 6, s.172.

Exemption (f) permits the deletion from the record of any identifiers (i.e. name, address and telephone number) of an informant mentioned in a police case report. Exemption (f) guarantees anonymity to individual citizens so as not to inhibit them from coming forward and providing law enforcement officials with information concerning matters under investigation. *Bougas v. Chief of Police of Lexington*, 371 Mass 59(1976). References identifying those officers present at the arrest scene were examined under the second clause of exemption (c). Exemption (c) balances the privacy interests of the officers against the public's right to know and it is only when the privacy interest outweighs the public interest that the exemption may be applied. *Attorney General v. Collector of Lynn*, 377 Mass 151, 156 (1976).

The public's right to know should prevail unless disclosure would publicize "intimate details" of a "highly personal nature." *Attorney General v Assistant Commissioner of Real Property Department of Boston*, 380 Mass 623, 625 (1980). It is well established that officers expect only a minimal amount of privacy concerning information that the public may use to assess the performance of the officers as public employees executing their official duties. Accordingly, this data is a matter of public record.

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SPR 83/88 (continued from previous page)

Likewise, exemption (c) allows for the segregation of portions of the report which identify the subject of a suspicious person report. The harm that disclosure would cause to the person's reputation outweighs the public interest, which is negligible where no crime was committed. Finally, the police logs are statutorily a public record by virtue of G. L. c. 40, s.48F.

SPR 84/157

Issue: The custodian sought an advisory opinion on whether a school committee's executive session transcripts are "records" subject to public disclosure.

Held: A verbatim transcript is a public record within the meaning of G. L. c. 4, s.7(26). It is thus subject to mandatory public disclosure under G. L. c. 66, s.10, unless it falls within a specific exemption found in G. L. c. 4, s.7(26).

Rationale: A government body may exclude a portion of its deliberations from an otherwise complete verbatim transcript of an executive session where no statute requires a verbatim transcript. *Perryman v. School Committee of Boston*, 17 Mass App. Ct. 346, 353(1983). However, this does not mean that if such a transcript were gratuitously made that it can never be a public record. Rather, the fact that it is not a record legally required to be made means that it is not automatically a public record by operation of St. 1973 c. 1050, s.6, the grandfather provision of the current Public Record Law. Pursuant to this provision , any record which was public prior to 1973 remains a public record under the present version of the Public Record Law. Prior to 1973 , the definition of a public record turned on whether a record was required by law to be made or received for filing. The transcript is documentary material made by an officer or employee of a board of a political subdivision of the Commonwealth. It is thus a public record under G. L. c. 4, s.7(26), unless it comes within one of the exemptions within that statute.

SPR 999

Issue: The Industrial Accident Board requested an advisory opinion as to the guidelines it should use in segregating its opinions so as to prevent the identification of specific individuals.

Held: Segregation must be done on an opinion - by - opinion basis. Exemption (c) requires that the public interest in how the Industrial Accident Board discharges its duties must be balanced against the privacy interest of specific individuals.

Rationale: Exemption (c) exempts the disclosure of information related to a specific individual where such disclosure could result in an unwarranted invasion of privacy.

Where exemption (c) applies to a portion of a record, the entire record is not necessarily exempt. *Reinstein v. Police Commissioner of Boston*; 378 Mass 281, 293 (1979). The custodian of a record must permit disclosure of any segregable portions of the record not falling within the confines of exemption (c). G. L. c. 66, s.10(a). Generally, segregation of the claimant's name, address, and social security number is usually sufficient to protect the identity of a claimant. Depending on the size of the employer and the circumstances leading to the accident, in some cases it may be permissible to segregate out the names of the employers and other employees or other identifying details.

SPR 920

Issue: Requester appealed the failure of a city solicitor to provide charts related to a proposed city budget used by the mayor in a presentation to a city municipal council.

Held: The charts are public records, not exempt from disclosure by exemption (e).

Rationale: Exemption (e) exempts from mandatory disclosure notebooks and other materials prepared by an employee of the Commonwealth which are personal to him and not maintained as part of the files of a government unit. Written records of a government officer executed in the discharge of his official duties are not within this exemption. *See U. S. v. First Trust Company of St. Paul,* 251 F. 2d. 686(8th Cir, 1958). In this case, the mayor, acting in his official capacity and using public funds, prepared the requested charts for a presentation before a governmental body. Exemption (e) only applies to materials prepared during non-working hours which reflect the personal views of the author on subjects unrelated to his or her official responsibilities. *See Public Affairs Associates, Inc v. Rickover* 268 F. Supp 444 (D.C. Cir. 1967). Accordingly, the charts are not personal to the mayor and are not exempt from mandatory public disclosure by exemption (e). Since no other exemption applies, the charts are public records.

Appellate Court Decisions

General Chemical Corporation v. Department of Environmental Quality Engineering and Others
19 Mass App. Ct. 287 (1985)

Facts: The plaintiff submitted reports to the Department of Environmental Quality Engineering (DEQE) concerning its operation of a hazardous waste facility. In response to a request for these reports, the Commissioner of DEQE determined that they contained no trade secrets and were thus disclosable under G. L. c. 66, s.10 (b). The plaintiff brought an action against DEQE, the Supervisor of Public Records, and the Public Records Division. It alleged that the determination by DEQE was made pursuant to an adjudicatory proceeding and thus it was entitled to judicial review of the determination, as provided by G. L. c. 30A, s.14, before disclosure could be made.

Issue: Whether a DEQE determination that a record contained no trade secrets, made pursuant to G. L. c. 21C, s.12, is an adjudicatory proceeding and thus subject to judicial review under G. L. c. 30A, s.14.

Held: Yes.

Rationale: G. L. c. 30A, s.14 provides that " any person ... aggrieved by a final decision of any agency in an adjudicatory proceeding ... shall be entitled to judicial review ...." Pursuant to G. L. c. 21C, s.12, DEQE determined that the records submitted by General Chemical did not contain trade secrets and thus were public records subject to disclosure under G. L. c. 66, s.10 (b). The determination by DEQE under G. L. c. 21C, s.12 is a final agency decision since no further agency review exists.

An adjudicatory proceeding is " a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right ... to be determined after opportunity for an agency hearing. " G. L. c. 30A, s.1 (1).

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General Chemical Corporation v. Department of Environmental Quality Engineering and Others
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(continued from previous page)

A trade secret is a property interest which is entitled to the protection of the due process clause of the Fourteenth Amendment to the United States Constitution . Constitutional due process requires that some form of hearing be held before a determination regarding such property interest is made. Since the determination by DEQE under G. L. c. 21C, s.12, involves property rights that are entitled under constitutional due process to a hearing, such determination is adjudicatory in nature pursuant to G. L. c. 30A, s.1 (1). Thus, G. L. c. 301, s.14 entitles General Chemical to judicial review.

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The Review

Trends in Government Disclosure

Public Records Division
Office of the Massachusetts Secretary of State
Michael J. Connolly, Secretary

The Review

Trends in Government Disclosure

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Office of the Secretary of State, Michael J. Connolly, Secretary

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SPR 85/80

ISSUE: A school committee's internal public records access policies were examined under the Public Records Law and regulations.

HELD: A committee's internal policy and practices must be consistent with the Public Records Law and regulations. A record custodian may not make a public records "request form" it has developed mandatory. A requester's record descriptions and a custodian's response time must be reasonable. They are not susceptible to standardization and advance formulation.

RATIONALE: The committee's use of a mandatory request form is improper because it prohibits the requester from exercising the right to make an oral request. G. L. c.66, s.10(b). The form asks if the requester has reviewed the committee's policy. This question improperly introduces an implied pre-condition that the request will not be honored unless this review is made. The form's requirement that a record be described "with sufficient particulars" is too specific. The description need only be reasonable. 950 CMR 32.05(4). A forty-eight hour minimum request compliance period is too inflexible. Situations may arise where a request should be processed in a shorter period of time. The copying fee of fifty cents per page is in excess of the maximum per page fee of twenty cents. 950 CMR 32.06. The committee cannot determine its own search and preparation fee because this fee is established by regulation. Id. It cannot require mailed requests to be sent first class, registered return receipt requested. The requests can be sent first class, postage paid. G. L. c. 66, s.10(b). Requests that can only be satisfied by retrieving the records from many sources cannot be referred to the original sources in order to lessen the committee's work load. The committee must retrieve any record it has access to or control over, regardless of the burden. 950 CMR 32.03. The policy gives examples of exempt materials that include misstatements of law and broad generalizations. Any examples should be tailored to specific records which have been previously scrutinized by the courts.

SPR 85/95

ISSUE: Requester was denied an opportunity to copy motor vehicle operators license data bulk sales records which he previously had been permitted to inspect.

HELD: A requester is entitled to both inspect and receive a copy of a public record.

RATIONALE: G. L. c. 66 s.10(a), grants any individual the right to examine public records. Direct-Mail Service v. Registrar of Motor Vehicles, 296 Mass. 353, 356 (1937) (the right to inspect public records includes the right to receive copies). The inspection or copying of a public record is a matter left to the requester's sole discretion.

SPR 85/37

ISSUE: The professional credentials of a public school teacher were evaluated under the first clause of exemption (c). Public access to school committee open session meeting minutes was also discussed in this advisory opinion.

HELD: Exemption (c) does not apply to a public employee's professional credentials. Open session minutes are public records upon their creation and are available to any person regardless of his or her status or motive.

RATIONALE: The first clause of exemption (c) absolutely exempts from disclosure personnel files and information that relate to a specifically named individual and are of a personal nature. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438. "Personal" is commonly understood to mean the intimate affairs of a particular individual. Public school teachers, however, do not have the same privacy expectations of private school teachers . The professional credentials of public school teachers are not so personal that disclosure would constitute an unwarranted invasion of privacy. Associated General Contractors v. U. S. EPA, 488 F. Supp. 861, 863 (D.C. Nev. 1980). Accordingly, these records must be disclosed because they do not fall within exemption (c).

The minutes become public records upon their creation. A school committee is not required to formally approve its minutes prior to their public disclosure. G. L. c. 39, ss. 23A-23C. Access to public records is not contingent upon a showing of need or a particular status. Torres v. Attorney General, 391 Mass.1,10 (1984). A custodian may not limit access to the news media and selected public officials. Essentially, a custodian may not otherwise infringe on the access rights provided by G. L. c. 66, s.10 and 950 CMR 32.05.

SPR 84/176

ISSUE: An advisory opinion was sought concerning the public records status of character references found in licensure applications to the Board of Real Estate Brokers and Salesman. The applications contain the names, addresses and occupations of the references.

HELD: Exemption (c) does not permit withholding public disclosure of the reference information.

RATIONALE: Exemption (c) only applies where the harm disclosure would cause to an individual outweighs the public interest in the information. The strong public interest in the instant information is manifested by the statutory provision that an applicant furnish evidence of good moral character. G. L. c. 112, s.87. Neither the applicant's nor the character reference's privacy interests outweigh the public interest in the competence of state professional licensees. Accordingly, exemption (c) does not apply.

SPR 85/18

ISSUE: Valuations found within field assessment cards prepared by an appraisal company under contract to a town were discussed. Questions arose regarding when the cards become public records and whether they fall within exemption (d).

HELD: The valuations are public records when they are submitted to the town board of assessors. Exemption (d) is not applicable because the valuations represent a reasonably complete factual study.

RATIONALE: The Department of Revenue's certification of the board's LA-1 form is not a factor in determining when the valuation data become public records. Receipt of the form by the board and the giving of instructions to the revaluation firm to mail impact statements are not relevant factors. Public record status is conferred on the valuation cards when they have been received by the board. G. L. c. 4, s.7(26). This requirement is satisfied when the valuations have been submitted to the board by the appraisal company.

Exemption (d) permits the non-disclosure of deliberative communications related to developing policy positions. The valuations are based on factual data pertaining to the land and structures on the inspected properties. They represent reasonably complete factual material even though they are subject to revision. Such factual material does not fall within exemption (d). Accordingly, valuations on field assessment cards are public records.

SPR 85/53

ISSUE: The names of persons whose cars have been "booted" for outstanding parking fines and the amount of such fines were evaluated under exemption (c) in an advisory opinion.

HELD: This information does not fall within exemption (c).

RATIONALE: The second clause of exemption (c) permits withholding disclosure of records related to a specific individual where the harm to the individual's privacy interest caused by disclosure of a record outweighs the public interest in the record. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). The public interest prevails unless disclosure would publicize "'intimate details' of a 'highly personal nature.'" Id. at 626. A statute provides that the failure to pay outstanding parking violation fines can result in motor vehicles being immobilized by a mechanical device (booted). G. L. c. 90 ss.20A1/2. These statutes indicate that there is a great public interest in knowing that local police are properly enforcing parking laws. Disclosure of this information may cause embarrassment to the individual whose automobile is immobilized. However, disclosure would not publicize "'intimate details' of a 'highly personal nature.'" Moreover, the public interest in seeing that individuals meet their public responsibilities prevails. Accordingly, exemption (c) is not applicable. The information must be disclosed.

SPR 85/32

ISSUE: Whether a requester's motive in seeking access to a daily police log provides a basis for a custodian to withhold disclosure.

HELD: The reason that a requester seeks a public record is irrelevant in determining whether the record must be disclosed.

RATIONALE: The custodian of a public record can not inquire as to why a requester is seeking a record or how he or she intends to use it. Direct-Mail v. Registrar of Motor Vehicles. 296 Mass. 353, 356 (1937). Therefore, a custodian can not refuse to give a requester access to a record solely because the request is for commercial reasons. The desired information in the police log concerns reported burglaries and robberies. This information is a public record pursuant to G. L. c. 4, s.98F and G. L. c. 4, s.7(26). Therefore, it must be disclosed to any requester.

SPR 85/06

ISSUE: An advisory opinion was issued on whether exemption (c) applied to a town's cancelled checks representing payment to a psychologist for providing professional services to the town's police department; and, certain long distance telephone bills for calls made by the police department to a particular state during a specified time period.

HELD: Non-payee endorsements on the cancelled checks fall within exemption (c). Long distance telephone numbers contained in telephone bills are exempt from mandatory disclosure by exemption (c) if they are unlisted or if they relate to personal calls not paid out of the public funds. The remainder of the telephone bills and checks are public records.

RATIONALE: Analysis under exemption (c) requires that the public's right to know be balanced against the individual's privacy interest which may be harmed by disclosure and not an objective determination of fact. Torres v. Attorney General, 391 Mass. 1, 9 (1984). The Supreme Judicial Court has stated that "the public right to know should prevail unless disclosure would publicize 'intimate details' of a 'highly personal nature.'" Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 626 (1980). The disclosure of all data on the cancelled checks other than non-payee endorsements would serve the public interest in understanding government financial operations and would not adversely impact any legitimate privacy interest. SPR 84/133. A long distance telephone number contained on a telephone bill may implicate a protected privacy interest if it is unlisted or relates to a personal call not paid out of public funds. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 627 (1980). Exemption (c) permits the non-disclosure of such numbers, only where the town demonstrates that the calls were of an exempt character. The public interest in monitoring public expenditures requires that all other information contained on a telephone bill be disclosed.

SPR 85/14

ISSUE: A discharge notice sent to a town policeman who is the subject of an ongoing private Civil Service Commission discharge hearing was examined under exemption (c).

HELD: The notice is exempt from mandatory disclosure by exemption (c) until a final disposition of the hearing has been issued, at which time the notice becomes a public record pursuant to G. L. c. 31, s.70.

RATIONALE: Exemption (c) applies to information related to a specifically named individual, in which the harm to the individual's privacy interest caused by disclosure outweighs the public's right to know the information. This situation occurs where disclosure would publicize "intimate details" of a "highly personal nature." Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 626 (1980). The public has a great interest in knowing about police misconduct and the method used by the appointing authority in handling such misconduct. This public interest must be balanced against the harm to the policeman resulting from disclosure. Disclosure of allegations of misconduct contained in the notice could damage the policeman's reputation and future employment opportunities. Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 293 (1979). "'Intimate details' of 'a highly personal nature'" were contained in the allegations which relate to non-work activities. The policeman's pending Civil Service Commission appeal hearing may reveal some of the allegations to be unfounded. Release of the allegations would thus unjustly tarnish the policeman's reputation. Accordingly, privacy considerations prevail. The notice falls within exemption (c) while the hearing is unresolved. The great public interest is satisfied by the fact that once the dispute is resolved, the hearing transcript and exhibits become public records. G. L. c. 31, s.70.

SPR 85/79

ISSUE: A review of an agency's twenty-five cent per page copying fee for 11 x 17 inch records and the amount assessed for a record search fee was made under the fee provisions of G. L. c.66 s.10(a) and 950 CMR 32.06.

HELD: The fees for copying records and conducting a record search are fixed by regulation. 950 CMR 32.06. Fees in excess of the regulation's maximum fees are invalid.

RATIONALE: The fee for a copy of a public record is twenty cents per page unless the record is not susceptible to ordinary means of reproduction. 950 CMR 32.06 (1)(a); 950 CMR 32.06 (1)(f). Here, the relevant copy machine was capable of producing 11 x 17 inch copies of the 11 x 17 inch records. Accordingly, the proper copying fee was twenty cents per copy. The search time expended on the records, the time needed to locate, pull from the files, copy, and reshelve or refile the record, was in excess of four hours. Since a six dollar per hour search time fee may be assessed for requests for non-computerized public records which take more than twenty mintues to complete, the twenty-four dollar search fee was not excessive. 950 CMR 32.06 (1) (c).

SPR 85/47

ISSUE: An out of court agreement between a town and one of its employees was evaluated under exemption (c). All parties to the agreement have consented to disclosure.

HELD: The individuals consent renders exemption (c) inapplicable to the contents of the agreement which relate to the consenting parties.

RATIONALE: Exemption (c) absolutely exempts from disclosure personnel information of a personal and volatile nature, related to a particular individual. Connolly v. Bromery, 15 Mass. App. Ct. 661, 664 (1983). It is designed to protect the privacy interests of the record subject. This provision is not violated by disclosure of the information to the subject of the data. Crooker v. Foley, Suffolk Super. Ct. CA. No. 33785 (Feb. 28, 1980). A subject of an exempt record may expressly waive his or her right to privacy. Accordingly, the contents of this agreement relating to the consenting parties must be disclosed.

SPR 85/71

ISSUE: The public records status of numerous municipal tax records concerning the non-payment of taxes over a ten year period was examined under exemption (c). The records examined included: the amount of taxes abated for non-collection by a town; a complete list of warrants issued by the town tax collector for non-payment of taxes; a list of town residents called to license suspension hearings for non-payment of auto excise taxes; and, the total amount of fees paid to the deputy tax collector.

HELD: Exemption (c) is not applicable. The deputy tax collector's fee information, however, is not a "record" under the statutory definition of public records.

RATIONALE: Exemption (c) prevents mandatory disclosure of public records related to a specific individual where the harm to the individual's privacy interest caused by disclosure outweighs the public interest in the records. Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818-819 (1978). The privacy interest prevails only where disclosure would publicize intimate details of a highly personal nature. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 626 (1980). Disclosure of the total amount of taxes abated does not disclose information related to specifically named individuals. Therefore, exemption (c) is not applicable and the information must be disclosed. Even if specific names were requested, they would not fall within exemption (c). Attorney General v. Collector of Lynn, 377 Mass. 151 (1979). Information contained in the warrants also would not be exempt from mandatory disclosure by exemption (c). There is a strong public interest in the names of delinquent taxpayers. The public has a right to know whether public employees are collecting delinquent accounts and whether the burden of public expenses is being distributed equitably. This public interest outweighs any invasion of privacy caused by disclosure of this data. Id. at 158.

SPR 85/77

ISSUE: The limited precedential value of federal court interpretations of the federal FOIA on medical and personnel information under the first clause of exemption (c) was discussed. The names, addresses, social security numbers and ages of a subcontractor's employees that were contained in certified payroll records filed with a city office of community development on a government sponsored construction project were evaluated under exemption (c).

HELD: Interpretations of the federal law regarding medical and personnel information are a limited aid in interpreting the first clause of exemption (c). A government construction subcontractor's employee records constitute personnel information falling within the first clause of exemption (c).

RATIONALE: Textual differences between the federal FOIA and the first clause of exemption (c) evidence a legislative rejection of the former statute's legal standards. Interpretations of the federal statute are inapplicable to Massachusetts law where they relate to personnel and medical files or information. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 431 (1983). The first clause of exemption (c) absolutely exempts from mandatory disclosure personnel information of a personal nature relating to a particular individual. Id. at 438. Exempt information normally would not be shared with strangers. Morrison v. School District # 48, Washington County, 631 P.2d 786, 789 (Ore App. 1981). It includes personal and volatile information related to an individual's employment. Connolly v. Bromery, 15 Mass. App. Ct. 661, 663-64 (1983). Salary information of private sector employees is such information. Private sector employees, unlike public employees, have a strong expectation of privacy concerning their salary information which brings this information within exemption (c). Attorney General v. Collector of Lynn, 377 Mass. 151, 157 (1979). However, any of this information which does not permit the identification of any individual is not exempt. Globe, 388 Mass. at 438. Consequently, the names, addresses, social security numbers, and any other identifying information of the employee fall within exemption (c). The remaining segregable portions of the payroll data are public records.

SPR 84/222

ISSUE: The public records status of material compiled by a police department as a result of the internal investigation of an alleged incident of misconduct by a police officer was the subject of an advisory opinion.

HELD: Portions of the materials are exempt from mandatory disclosure by exemptions (a), (c), and (f). The remaining segregable portions of the materials are public records.

RATIONALE: Exemption (c) exempts records from mandatory disclosure where the harm to an individual's privacy interests caused by disclosure outweighs the public interest in disclosure. The public interest prevails unless disclosure would publicize "'intimate details' of 'a highly personal nature.'" Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 626 (1980). This investigation exonerated the officer. Therefore, disclosure of the details of the investigation would not harm his privacy interest by damaging his professional standing. The incident generated a great amount of ethnic tension. Disclosure could reduce this tension by contributing to a greater public understanding of the incident. This public benefit prevails over any privacy considerations. Accordingly, disclosure would not result in an unwarranted invasion of the officer's privacy under exemption (c). Other individuals may suffer unwarranted invasions of privacy if certain of the materials are released. There is a strong privacy interest in the names and addresses of individuals arrested during the incident . This is indicated by the enactment of G. L. c. 6, s.167 (CORI). All information in a report of emergency medical technicians concerning biographical data and treatment of a patient injured during the incident also implicates a strong privacy interest. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 488 (1983). These two instances of invasion of privacy are great enough to justify deletion of this information from disclosure under exemption (c).

Exemption (f) exempts investigatory materials, the disclosure of which would unduly prejudice law enforcement activities. Disclosure of the names of witnesses and complainants involved in the incident would breach the implied promise of confidentiality made to induce their statements. This would unduly prejudice law enforcement by deterring others from volunteering information. Disclosure of witness accounts that refer to the actions of a participant in the incident whose criminal trial is pending would unduly prejudice the prosecution's case. These prejudicial materials fall within exemption (f) and should be deleted from the disclosed materials.

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SPR 85/222

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Exemption (a) applies to any records made exempt by statute. Any materials compiled by a criminal justice agency which pertain to an identifiable individual and relate to the nature or disposition of a criminal proceeding concerning an offense that could result in incarceration are not public records by virtue of G.L.c. 6, s.167. These materials fall under exemption (a).

SPR 85/78

ISSUE: Whether a request for a municipal government record which is improperly based on G. L. c. 66A, the Fair Information Practices Act (FIPA), can serve as a valid public records request. A police background investigation report concerning the requester that was compiled during the appointment process for a police position was evaluated under exemption (c).

HELD: FIPA does not apply to municipalities. A FIPA request, however, can serve as a valid request under the Public Records Law. Exemption (c) applies only to portions of the report that reveal the identities of private individuals rather than public employees. All other portions of the report are subject to disclosure.

RATIONALE: FIPA, by statutory definition does not apply to municipalities. G. L. c. 66A, s.1; Spring v. Geriatric Authority of Holyoke, 394 Mass. 274, 280-282 (1985). A request which is improperly based upon FIPA is to be treated as a public records request due to the Public Records Law's encouragement of broad public access to records. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 436 (1983). 950 CMR 32.01. Inartfully drawn requests for records can not be dismissed because the substance of the request is to be preferred over form. Ferri v. Bell, 645 F 2d 1213 (3rd Cir., 1981).

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SPR 85/78 (continued from previous page)

The first clause of exemption (c) absolutely exempts from mandatory disclosure personnel information of a personal nature related to a specific individual. Globe, 388 Mass. at 438. "Information of a personal nature" is "information which may harm the subject of the record." United States Department of State v. Washington Post Co., 102 S. Ct. 1957, 1961 and n. 4 (1982). A background report is personnel information because it forms part of the hiring process. State v. Hernandez, 552 P. 2d 1174, 1175 (N.M. 1976). The report contains candid comments on the requester's career and social acquaintances which relate to his reputation and character. This information is personnel information that would normally be exempt from mandatory disclosure by exemption (c). However, the exemption (c) privacy right protections may not be raised against the individual subject of the record. Crooker v. Foley, Suffolk Super. Ct., C.A. No. 33785 (Feb. 28, 1980). The second clause of exemption (c) is relevant to the individuals who made the report's comments. This clause exempts from mandatory disclosure records in which the seriousness of the individual's privacy invasion caused by disclosure outweighs the public interest in disclosure. This occurs only where disclosure would publicize "' intimate details' of a 'highly personal nature.'" Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625-626 (1980). The report contains certain comments made by town police officers in the course of their official duties. The public interest in knowing how well officers perform these duties outweighs the small harm to their privacy interests disclosure would cause. Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818-819 (1978). Exemption (c) is not applicable to these comments. However, disclosure of comments made by persons other than the officers may harm these individuals' privacy interests. The comments may contain data about these individuals that is unrelated to the reports' objectives. In addition, disclosure of an individual's candid perceptions of another impinges on the perceiver's privacy. These individual's have no public responsibilities that would implicate a strong public right to know. Accordingly, the privacy interests prevail and exemption (c) applies to these comments.

SPR 85/09

ISSUE: The public records status of service of process made upon a town clerk in accordance with G. L. c. 223, s.37 was examined in an advisory opinion.

HELD: The records of service of process, filed with a town clerk do not fall within exemption (c).

RATIONALE: G. L. c. 223, s.37 requires a town clerk to receive service of process in any action against the town. This requirement makes the service of process "received" by a political subdivision of the Commonwealth within the meaning of G. L. c. 4, s.7(26). The documents are public records unless a statutory exemption applies. Exemption (c) was considered. It applies to records which relate to a specifically named individual the disclosure of which would result in an unwarranted invasion of privacy. Service of process records implicate minor, if any, individual privacy interests. The public's compelling interest in being informed of the initiation of litigation involving their town tilts the balance in favor of disclosure. The public interest outweighs any individual privacy interest which may be harmed by disclosure. Accordingly exemption (c) does not apply and the records are subject to public disclosure.

SPR 85/12

ISSUE: Departmental budget proposals passing through a municipal budgeting process were examined under exemption (d) in an advisory opinion.

HELD: A completed departmental budget proposal/request is not a deliberative document and does not fall within exemption (d).

RATIONALE: Exemption (d) permits withholding disclosure of deliberative communications related to the development of policy positions. It does not apply to reasonably complete factual reports. A budget proposal showing projected allocations of funds is such a factual report. See County Commissioners of Norfolk County v. Board of Norfolk County Retirement System, 377 Mass. 696, 702 (1979). A proposal is completed when it has been put into a form which represents final action at a given administrative level. Departmental requests and all drafts of proposals submitted to town government represent final action by the particular department. They do not fall within exemption (d).

SPR 84/198

ISSUE: Written police policies and procedures governing the conduct of police personnel during high speed pursuits were sought as a public record.

HELD: The high speed pursuit policy is a public record because exemptions (b), (d), and (f) do not apply.

RATIONALE: The policy contains only factual and statistical data reflecting adopted government policy . The document is also publicly available from another source. Exemption (d) is inapplicable because the policy represents an adopted agency policy position. The document describes a general police procedure which does not contain secret investigatory techniques that are exempt under exemption (f). Moreover, disclosure of the requested materials would not unduly prejudice a specific investigation. Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 290-292 (1979). Consequently, exemption (f) does not apply.

Exemption (b) was also raised. This exemption does not apply to the policy. The high speed chase of criminals is an extremely dangerous activity. It can pose a serious threat to the personal safety of innocent bystanders. Exemption (b) only applies to internal personnel rules necessary for the performance of governmental functions in which there is no public interest in disclosure. Department of the Air Force v. Rose, 452 U.S. 352, 369 (1976). The manner in which police engage in inherently dangerous activities is a matter of great public interest. Accordingly, the police policy does not fall within exemption (b). The high speed policy is a public record.

Appellate Court Decisions

George W. Prescott Publishing Co., v. Register of Probate for Norfolk County, 395 Mass. 274 (1985)

FACTS: Plaintiff appealed a judgement allowing continued impoundment of certain materials related to a divorce proceeding. A party to the proceeding was a county treasurer being investigated for alleged misuse of public funds. The materials included portions of the treasurer's deposition, financial statements required by Rule 401 of the Supplemental Rules of the Probate Court, and the notice of deposition of a third party.

ISSUE: 1. Whether divorce proceeding records of a public official who is alleged to have misused public funds can be impounded? 2. Whether records relating to third parties can be impounded?

HELD: 1. No, in most cases. 2. No, in most cases, if the party is a public official.

RATIONALE: Divorce proceeding records should be impounded only where a "good cause" is determined by balancing the privacy interests at issue against the competing "principle of publicity." Ottaway Newspapers Inc. v. Appeals Court, 372 Mass. 539, 546 (1977). Most divorce litigants' expectation of privacy would constitute good cause to justify impoundment. Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2208, n.21, 2209 (1984). However, a public official has a diminished privacy interest with respect to information relevant to his or her office. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 436 n. 15 (1983). There is no invasion of privacy where the subject matter of the materials is of sufficient public concern to warrant extensive media coverage. Restatement (Second) of Torts, 652D, comments b,d (1977). The public has a vital interest in all information relevant to a public official's alleged misconduct related to his or her public duties. Accordingly, the principle of publicity should prevail over privacy concerns in most such instances. The subject of the deposition and financial statements is a public official whose alleged misconduct in office has generated media coverage. Consequently, impoundment of these materials is improper unless there is a showing of overriding necessity. Allegations of potential embarrassment or the fear of unjustified adverse publicity are not sufficient reasons to justify impoundment. If a third party referred to in the notice is a public official, and if the notice is relevant to allegations of misconduct in office, then impoundment is justified only on a showing of overriding necessity.

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ISSUE: A police department's internal investigation records were evaluated under exemptions (c) and (f).

HELD: The names, ages, dates and places of birth and addresses of witnesses in an investigation fall under exemption (f). All other records are public.

RATIONALE: Exemption (c) exempts from mandatory disclosure information relating to a specifically named individual in which the privacy interest which may be harmed by disclosure outweighs the public's right to know the information. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). The strong public interest in knowing the names of the police officers who filed the investigative reports outweighs the minimal privacy expectations that these public employees have regarding their names. Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812 (1978); see also G. L. c. 41,s.98C and 98D. Accordingly, the police officers' names are public records.

Ordinarily, the identity of a person held in protective custody is considered an intimate detail of a personal nature meriting application of exemption (c). Real Property, 380 Mass. at 626. However, here the person held gave the requester his written consent to obtain the records on his behalf. This consent waives any right to record privacy implicated by disclosure of these records to this requester. Crooker v. Foley, Suffolk Superior Ct. C. A. No. 33785 (Feb. 28, 1980). Accordingly, exemption (c) is inapplicable to this information.

Exemption (f) prevents mandatory disclosure of investigatory materials the disclosure of which would unduly prejudice effective law enforcement. One of its purposes is to encourage individuals to come forward and speak freely concerning matters under investigation. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976). Information identifying witnesses whose statements are included in the records fall within exemption (f). Disclosure of this information would tend to inhibit both present and future law enforcement efforts. No other information contained in these records which relate to a closed investigation reveals confidential investigatory techniques or procedures or other materials that would unduly prejudice law enforcement activities. Accordingly, this information must be disclosed.

SPR 85/100

ISSUE: Department of Social Services documents revealing the inception and approval date of a foster child placement, a schedule of payments and any indicia of the continuation or termination of the foster child-parent relationship were evaluated under exemption (c). Redaction of exempt materials from a record and how access is affected by the requester's status as a litigant were also discussed.

HELD: The documents are exempt from mandatory disclosure by exemption (c). An entire DSS case file is exempt because disclosure would result in an unwarranted invasion of personal privacy even if all identifying details are redacted from the file. A requester's status as a litigant is irrelevant in determining access to public records.

RATIONALE: The second clause of exemption (c) permits withholding disclosure of records related to a specific individual where the harm to the individual's privacy interest caused by disclosure of a record outweighs the public interest in the record. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). The public interest prevails unless disclosure would publicize "intimate details" of a "highly personal nature." Id., at 626. The information in a DSS file contains "intimate details" of a "highly personal" nature. The data subjects expectation of privacy is also relevant in determining whether disclosure constitutes an invasion of privacy. Torres v. Attorney General, 391 Mass. 1, 9 (1984). An expectation of privacy is justified where an individual has provided personal data as part of a governmentally assisted program. Id., at 8, n. 10. Therefore, information provided to DSS in connection with obtaining government services or benefits falls under exemption (c). Id., at 8.

Exempt information should be deleted from a document and the remainder should be disclosed. G. L. c. 66, s.10(a). Deletion of identifying details from a DSS case file may, in some circumstances, allow the remainder of the file to be disclosed. However, this measure is inappropriate where, as here, there remains a grave risk of indirect identification. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438 (1983).

Any person may inspect or obtain a copy of a public record. This access right is not contingent upon a showing of need or status, official or otherwise. Bougas v. Chief of Police of Lexington, 371 Mass. 59 (1976). Consequently, an individual's status as a litigant is not a relevant factor.

SPR 85/62

ISSUE: A school committee executive session transcript was the subject of a public records appeal. Questions arose over whether an in camera inspection to determine its public records status was appropriate; whether a record subject's consent to disclosure made the entire transcript a public record; and whether any exempt portions of the transcript were capable of being redacted without revealing individual identities.

HELD: An in camera inspection is an appropriate measure where the transcript's public records status is not readily ascertainable. A record subject's consent does not affect the exempt character of data implicating privacy interests of other named individuals. Identifying information relating to exempt information is to be excised from the transcript; the remaining portion of the transcript is an independent public record.

RATIONALE: A verbatim recording of an executive session which is voluntarily made by a governmental body does not automatically become a public record under the Open Meeting Law, G. L. c. 39,s.23B (7). Perryman v. School Committee of Boston, 17 Mass App Ct. 346, 353 (1983). The first clause of exemption (c) absolutely exempts from mandatory disclosure personnel information of a personal nature which is related to a specific individual. The committee's invocation of exemption (c) is not sufficient to withhold disclosure of the entire transcript. An in camera inspection is necessary to determine whether certain portions of the transcript fall within exemption (c).

Exemption (c) does not apply where the subject of the record consents to its disclosure. Crooker v. Foley, Suffolk Superior Court, C.A. No. 33785 (1980). The exemption may still apply, however, where there are allegations of misconduct concerning other named individuals who have not consented to disclosure. The allegations in this case which involve other named individuals concern personnel matters, are of a personal and volatile nature and relate to specifically identifiable individuals. Exemption (c) is therefore applicable to these allegations.

Segregable portions of an otherwise exempt record must be disclosed. G. L. c. 66, s.10(a); Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 287, 293 (1979). If redaction of identifying details is possible, the remaining information loses its exempt character and is no longer exempt from disclosure. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass 427,438 (1983). Here, redaction of the names of the other named individuals is sufficient to prevent their identification. Therefore, the remainder of the transcript is a public record.

SRP 85/144

ISSUE: 1.) Whether certain vital statistics in a computerized format are subject, in whole or in part, to the public records access provisions of G. L. c. 66 s.10.

2). The extent of a local government's duty to preserve and maintain computerized records under the general records management provisions of G. L. c. 66.

HELD: Public records status is not determined by physical form or characteristic. The expansive definition of public records found in G. L. c. 4, s.7(26) clearly includes computerized data. See SPR 84/140; 1970/71 Op. Atty. Gen. No. 7 p. 43 at 46 (August 28, 1970).

RATIONALE: Exemption (a) applies to records that are "specifically or by necessary implication exempted from disclosure by statute." The pertinent statutes are G. L. c. 46, s.2A, and c. 374, s.2. This former statute restricts access to certain records of vital statistics compiled after 1890 and provides as follows: "Examination of records and returns of illegitimate births, or abnormal sex births, or fetal deaths, or of the notices of intention of marriage and marriage records in cases where a physician's certificate has been filed under the provisions of section twenty A of chapter two hundred and seven, or those of illegitimate persons, or of copies of such records in the department of public health, shall not be permitted except upon proper judicial order, or upon request of a person seeking his own birth or marriage record, or his attorney, parent, guardian, or conservator, or a person whose official duties, in the opinion of the town clerk or the commissioner of public health, as the case may be, entitle him to the information contained therein, nor shall certified copies thereof be furnished except upon such order or the request of such person."

There are no specific statutes governing the security of data contained within a local governmental computer system. Cf. G. L. c. 66A, ss.2(C) and 2(d). Only general standards for the preservation, management, storage and destruction of local governmental records are established by G. L. c. 66, s.8. A record custodian, however, has a duty, at the very least, to prevent the inadvertent destruction of records by fire. G. L. c. 66, ss. 11-12 (1984). In addition, the Supervisor of Public Records is authorized to take all necessary measures to secure the proper custody, condition and preservation of municipal records. G. L. c. 66, s.1 (1984); Bristol County v. Secretary of the Commonwealth, 324 Mass. 403 (1949).

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Either an independent computer system under the exclusive control of the town clerk for the storage of vital records or a direct access hook-up to the school department computer data system would adequately ensure security. Consequently, data security concerns do not require the establishment of individual automated data processing systems for particular agencies. Local level inter-agency sharing of data processing services is permissible.

SPR 85/81

ISSUE: The mailing lists of a town council on aging were evaluated under exemption (c) in an advisory opinion. The public access rights of a commercial entity were also examined.

HELD: The harm to an individual's privacy interests caused by disclosure of the lists is insufficient to warrant the application of exemption (c). The fact that an individual has a commercial motive in requesting access to public records does not justify non-disclosure of the records.

RATIONALE: The second clause of exemption (c) exempts from mandatory disclosure information in which the public's right to know is outweighed by the potential harm to an individual's privacy interest caused by disclosure of the information. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). The public's right to know should prevail unless disclosure would publicize "'intimate details' of a 'highly personal nature.'" Id. The disclosure of an individual's name and address poses an insufficient invasion of privacy to implicate exemption (c). Getman v. N.L.R.B. 450 F. 2d 670, 675 (D.C. Cir. 1971). The possibility of receiving unwarranted solicitations is also not a serious threat to privacy. Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C. 1977). Indeed, the solicitations may benefit the individual by providing him or her with useful information.

A custodian cannot deny access to a public record on the basis of the requester's motive in seeking access to the record. Direct Mail Service v. Registrar of Motor Vehicles, 296 Mass. 353, 356 (1932); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976).

SPR 85/86

ISSUE: The names and case numbers contained in a school district's legal bills were evaluated under exemption (c). The fee to be charged for providing a complete copy of a record that was previously supplied to the requester in an improperly redacted form is also discussed.

HELD: The names and case numbers found in a governmental body's legal bills are not intimate details of a personal nature and thus do not fall under exemption (c). A custodian may recover reasonable expenses for searching and finding records. However, the time spent improperly redacting records can not be recovered in the fee.

RATIONALE: The second clause of exemption (c) permits withholding disclosure of records related to a specific individual where the harm to the individual's privacy interest caused by disclosure of a record outweighs the public interest in the record. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). The public interest prevails unless disclosure would publicize "intimate details" of a "highly personal nature." Id. at 626. Public employees do not have the same expectation of privacy in matters relating to the conduct of their public duties as their private sector counterparts. George W. Prescott Publishing Co. v. Register of Probate for Norfolk County, 395 Mass. 274, 278 (1985). Release of the fact that a current or former public employee is engaged in litigation with his or her employer over a matter related to public employment does not reveal an "intimate detail" of a "highly personal nature." Id. at 278 and 282. This is especially true where the information is readily available through the clerk of the court. This information is routinely presented in a public setting, is relatively innocuous, and is thus not so personal that its disclosure would constitute an unwarranted invasion of personal privacy. Eskaton Monterey Hospital v. Myers, 184 Cal Rptr. 840, 843 (Cal. 1982).

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In contrast, there is a great public interest in the collection and disbursement of public funds and in the record of a court proceeding concerning the job performance of a public employee. Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818-819 (1978); Prescott, 395 Mass. at 278 and 282. This public interest prevails and the information must be disclosed. Requester was billed for three hours of "search and find time" for the copies of the legal services bills that she received. If any portion of the "search and find time" was used to delete the names and case numbers, the requester's fee should be reduced by an appropriate amount. It is inappropriate for a custodian to charge a requester for the improper redaction of records. Copies of the complete bills must be sent to the requester at no additional expense. A custodian may request only a reasonable fee, derived from 950 C.M.R. 32.06, for the expenses incurred in responding to records requests.

SPR 85/34

ISSUE: Field notes taken by sanitarians employed by a board of health during the course of field testing were evaluated under exemption (b).

HELD: Exemption (b) does not apply because the notes are of legitimate public concern.

RATIONALE: Exemption (b) exempts from disclosure records related soley to the internal practices of a governmental unit if the record is of no legitimate interest and its disclosure would impair the proper performance of necessary governmental functions. Crooker v. Bureau of Alcohol,Tobacco and Firearms, 670 F.2nd 1051 (D.C. Cir. 1981) A permit to construct an individual sewage system where a municipal sewage system is not accessible can only be issued after a representative of the local board of health has performed a site examination. State Environmental Code, Title 5, 310 C.M.R. 15.03(1). Field notes were taken to document the required site examinations. They also serve as a means of double checking the information provided by applicants for permits to construct sewage disposal systems. The public has a legitimate and strong interest in ensuring that public officials are properly performing these important official duties. Accordingly, exemption (b) is not applicable and the notes must be disclosed. A town may attach a disclaimer to records regarding the reliability of the facts contained therein if they deem it to be necessary.

SPR 85/145

ISSUE: Whether the amount of private duty expenditures and the number of sick days of members of a police department are public records within the meaning of G. L. c. 4 s.7(26).

HELD: The information is public, subject to disclosure.

RATIONALE: The privacy exemption found in G. L. c. 4 s.7(26) (c) is pertinent. The second clause of this exemption requires a balancing of the public's interest in disclosure against the individual employee's privacy interest. The balance tilted in favor of disclosure in the present case.

Private duty expenditures are compensation for work performed which is officially related to the employee's regular employment. Although the funds for special duty are provided by private parties, the accounting, payment and records of private duty pay are handled by the town treasurer as municipal business. See G. L. c. 44, s53C. Thus, the public has a strong and compelling interest in its disclosure. It has also been recognized that public employees have less of an expectation of privacy than ordinary citizens. Hasting & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978) (the names, base pay, overtime pay, gross pay and miscellaneous payments of municipal employees are public records).

The number of sick leave days taken, as with other public employee attendance records such as personal leave days, vacation days and overtime, has been subjected to the balancing test and consistently held to be public records subject to disclosure. (See SPR 83/53).

SPR 85/94

ISSUE: The public records status of a letter from a doctor to the Secretary of Human Services regarding a patient in a state mental health institution was examined under exemption (c).

HELD: Exemption (c) absolutely exempts the letter from disclosure because the letter contains information regarding the level and type of medical treatment being provided to the requester's son.

RATIONALE: Exemption (c) absolutely exempts from disclosure medical information. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438 (1983). The parent of an adult child cannot obtain access to the child's medical information without his authorization.

SPR 85/92

ISSUE: A town's internal public records access policies were examined under the the Public Records Law. The policy required all records requests to be in writing and to be for specific records. The policy also established a seventy-two hour maximum compliance period.

HELD: An individual may request access to public records through either oral or written means. A person is only required to provide a reasonable description of the record sought. All requests must be complied with as soon as practicable.

RATIONALE: Requests for public records may be oral or written, 950 CMR 32.05(4). Moreover, there is no rigid specificity requirement for describing the records sought. The record custodian must respond to any request without unreasonable delay and as soon as practicable. Id. at 32.05(2); G. L. c.66, ss.10(a) and 10(b). Consequently, an inflexible seventy-two hour compliance period may be unreasonable in certain circumstances, such as when a record is readily available and its public records status is not in question.

SPR 84/154

ISSUE: An advisory opinion was sought on the public records status of the names of psychologists who have been terminated by a health insurance carrier from participation in its program under G. L. c. 176B, s.12.

HELD: The names are public because exemption (c) does not apply.

RATIONALE: Exemption (c) applies only where the harm to an individual's privacy interest caused by disclosure of a record outweighs the public interest in the record. Here the insurance health care provider whose fact and manner of reimbursement is disclosed may be harmed. Also, the reputation of the psychologist may be harmed. However, the public has a strong interest in seeing that health care insurance programs are effective and in knowing the identities of psychologists participating in such programs. This public interest outweighs any harm caused to individual privacy interests because the names are outside the scope of any reasonable or legitimate expectation of privacy which an individual provider might have. 76/77 Op. Atty. Gen. No. 32, May 18, 1977.

SPR 85/147

ISSUE: Whether correspondence received by a board of selectmen is a public record and not exempt from mandatory disclosure as a "record" of an executive session.

HELD: Correspondence received by a board of selectmen is not exempt from disclosure until it has actually become the subject of a legitimate executive session.

RATIONALE: The Open Meeting Law, G. L. c. 39, s.23B, operates through G. L. c. 4, s.7(26)(a), to exempt the "record" of the deliberations of an executive session. By definition, the "record" of an executive session is limited to the date, time, place, members present or absent, and action taken at each meeting. G. L. c. 39, s.23B. It does not extend to pre-existing documents simply because they may become the subject of a legitimate executive session. Consequently, a piece of correspondence is subject to mandatory disclosure as soon as practicable and within ten days of receipt of a request, unless an exemption in G. L. c. 4, s.7(26) applies.

SPR 85/110

ISSUE: The public records status of a list of individuals awaiting public boat moorings was examined in an advisory opinion.

HELD: The harbormaster's mooring waiting list does not fall within the privacy exemption, exemption (c). Accordingly, it is a public record subject to disclosure.

RATIONALE: The second clause of exemption(c) requires a balancing of the public's right to know against the record subject's privacy interests. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 683, 685 (1980). The public right to know should prevail unless disclosure would publicize "intimate details" of a "highly personal nature." Attorney General v. Collector of Lynn,377 Mass. 151, 157 (1979). The public has a legitimate interest in knowing how the limited supply of boat moorings are being distributed. The privacy interest at stake, in contrast, is minimal. Disclosure of the names of people seeking public mooring facilities does not reveal "intimate details" of a "highly personal nature." Furthermore, the requested information can be obtained elesewhere. G. L. c. 90B, s.3 (g) makes public the name, address, and identification number of all motor boat owners. The availability of the information elsewhere and its innocuous nature requires its disclosure.

SPR 85/20

ISSUE: A town personnel board's salary proposal and impact statement for the forthcoming year was examined under exemption (d) in an advisory opinion.

HELD: The particular record in question is a reasonably complete factual study not exempt from mandatory disclosure under exemption (d).

RATIONALE: Exemption (d) permits withholding disclosure of deliberative communications relating to developing policy positions. It does not apply to reasonably complete factual reports. The instant record was prepared as part of a town government mandated process. It may be inaccurate and subject to revision. However, it is a reasonably completed factual study representing a final policy position of a town board. Accordingly, exemption (d) does not apply to this final board action at this given level. The record must be disclosed.

SPR 85/97

ISSUE: Whether a record custodian must comply with records requests made through the mail.

HELD: A records custodian must comply with any public records request which specifies delivery by mail.

RATIONALE: Every person having custody of a public record shall furnish a copy to the requester of the record for a reasonable fee. G. L. c. 66, s.10(a). The record may be received either in hand or by mail. G. L. c. 66, s.10(a). A person requesting delivery of a record by mail must receive it in that manner. 950 C.M.R. 32.05(1); 950 C.M.R. 32.05(6); 950 C.M.R. 32.06(3).

SPR 85/98

ISSUE: The public records status of a tape of a town board of selectmen meeting was considered.

HELD: The tape is a public record.

RATIONALE: A tape made by an employee of a board of a political subdivision of the Commonwealth is a public record. G. L. c. 4, s.7(26). Minutes of open meetings become public records at the moment they are made. SPR 82/86. The requirement in St. 1960. 437 s.3, that open meeting records be approved prior to their release was removed by St. 1975, c. 303, s.3, the current Open Meeting Law.

SPR 85/104

ISSUE: A value opinion appraising property being considered for purchase by a city redevelopment authority was evaluated under exemption (i).

HELD: The opinion is exempt from mandatory disclosure by exemption (i).

RATIONALE: Exemption (i) provides for the non-disclosure of appraisals of real property acquired or to be acquired until 1) a final agreement is entered into; 2) any litigation relative to such appraisal has been terminated, or 3) the time within which to commence such litigation has expired. This exemption provides government agencies engaged in the acquisition of real property through eminent domain proceedings with the same degree of confidentiality which is afforded to private parties. The value opinion is an appraisal. The opinion falls within exemption (i) because the property it relates to is still under consideration for purchase.

SPR 85/87

ISSUE: A list of individuals receiving real estate tax abatements due to blindness was evaluated under exemption (c).

HELD: The list falls under exemption (c) because it reveals intimate details of a personal nature.

RATIONALE: Records involving the abatement of real estate taxes that blind persons are entitled to pursuant to G. L. c. 59, s.5, clause 37, are not expressly made public by G. L. c. 59, s.51. The general definition of the public records found in G. L. c. 4, s.7(26), however, applies. Attorney General v. Collector of Lynn, 377 Mass. 151 (1979). The second clause of exemption (c) permits withholding disclosure of records related to a specific individual where the harm to the individual's privacy interest caused by disclosure of a record outweighs the public interest in the record. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). The public interest prevails unless disclosure would publicize an "intimate detail" of a "highly personal nature," such as a person's medical condition. Id. at 626. Accordingly, exemption (c) exempts from mandatory disclosure this list of individuals receiving abatements under G. L. c. 59, s 5 (37).

Appellate Court Decisions

District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1984)

FACTS: The defendant selectmen held a closed executive session with its counsel to discuss a contract negotiation concerning rubbish disposal. They acknowledged that G. L. c. 39, s.23B, the Open Meeting Law, did not expressly permit this session, but contended that the law impliedly permitted it. The minutes of the session were not made public. The plaintiff brought an action seeking public disclosure of the session record. The trial court held for the plaintiff. The court ordered the record to be made public and the defendant to carry out the provisions of the Open Meeting Law at future meetings. The defendant appealed.

ISSUE: 1.) Whether there is an implied exception to the Open Meeting Law for meetings of a governmental body with its legal counsel. 2.) Whether the Open Meeting Law, as applied, violates Art. 30 of the Declaration of Rights of the Massachusetts Constitution. 3.) Whether the judgement exceeded the scope of the remedy provided by the Open Meeting Law.

HELD: No to issues one and two; and, yes to issue three.

RATIONALE: All meetings of a governmental body are open to the public. G. L. c. 39, s.23B. There are seven distinct exceptions to this rule which are the only limitations on the operation of the statute. No other exceptions will be inferred. 2A N.J. Singer, Sutherland Statutory Construction s. 47.11 (4th ed. 1984). The Legislature contemplated the need for confidential discussion between attorneys and their public clients in enacting exception (3) for litigation and collective bargaining. They contemplated the need for confidentiality in contract negotiations in enacting exception (6) for contracts involving real property. The defendant's argument concerning the importance of confidentiality in large contract negotiations is not acknowledged by the legislative mandate.

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Article 30 of the Declaration of Rights of the Massachusetts Constitution prohibits the legislative department from exercising judicial powers. The Open Meeting Law is a proper exercise of legislative power over the operation of governmental bodies. Edgartown v. State Ethics Commission, 391 Mass. 83, 90 (1984). It does not regulate the legal profession by compelling an attorney present at a public meeting to violate the attorney-client privilege. Rather, the Open Meeting Law provides that a governmental body that holds a meeting not falling within one of the law's exceptions waives its privilege concerning communications to its attorney made at the meeting.

Although the language of the judgement, requiring the selectmen to "carry out the provisions of the [Open Meeting Law]," is broad, it is clear that the defendant should be ordered to hold executive sessions "only for the purposes enumerated in s.23B." Nigro v. Conservation Commissioner of Canton, 17 Mass. App. Ct. 433, 436 (1984).

Mary Pottle and Others v. School Committee of Braintree, 395 Mass 861 (1985)

FACTS: Requester sent a written request to the Braintree School Department to obtain the names, addresses, and job classifications of all Braintree public school employees. The plaintiff school employees sought exemption from disclosure under G. L. c. 4, s.7(26)(c) claiming an unwarranted invasion of privacy.

ISSUE: Whether the release of public school employees' names and addresses constitutes an unwarranted invasion of privacy under G. L. c. 4, s.7(26)(c).

HELD: Release of public school employees' names and addresses does not constitute an unwarranted invasion of privacy under G. L. c. 4, s.7(26)(c).

RATIONALE: Hastings and Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 821 (1978), is controlling. G. L. c. 4, s.7(26)(c) does not apply to the names and addresses of public employees. Public employees have diminished expectations of privacy. Names and addresses do not fall into the category of "intimate details" of a "highly personal nature" necessary for exemption. Id. at 818, quoting Getman v. N.L.R.B., 450 F.2d 670, 675 (D.C. Cir. 1971). Furthermore, the information sought is available from other public record sources such as street lists, the registry of motor vehicles, and telephone directories.

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Trends in Government Disclosure

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SPR 85/150

ISSUE: Once a contract has been awarded, does G. L. c. 4, s.7 (26)(h) and G. L. c. 4 s.7 (26)(g) apply to bar disclosure of records relating to a public competive bidding contract, and if it does, is a successful bidder's supplemental material considered confidential information under exemption (g).

HELD: Records relating to a public competitive bidding contract are subject to disclosure once the contract has been awarded. A successful bidder's supplemental materials cannot be considered confidential financial information if they are submitted as a condition of receiving a public contract or benefit.

RATIONALE: The exemption for public competitive bidding, G. L. c. 4, s.7 (26)(h), addresses two types of records, each with its own time frame. The first type concerns information sent by biddders. Where these bids or proposals are to be opened publicly, they are not subject to disclosure until the bid opening. In all other cases, bids are not subject to disclosure until the time for receipts of bids or proposals has expired.

The second type of records under exemption (h) are inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals prior to a decision to enter negotiations with or to award a contract to a particular person.

In order for supplemental material submitted by a successful bidder to be considered confidential information exempt from disclosure, all six elements of exemption (g) must be met. Exemption (g) is stricter than its federal counterpart, 5 U.S.C. s. 552 (b)(4) and therefore, rejects that statute's broader protection of trade secrets and commercial or financial data. The six elements of exemption (g) are: trade secrets or commerical or financial information; voluntarily provided to an agency; for use in developing governmental policy; upon a promise of confidentiality; information not submitted as required by law; and information not submitted as a condition of receiving a government contract or benefit. The material in this case was clearly submitted as a condition of receiving the contract. Therefore, exemption cannot serve as a basis to withhold disclosure of the requested supplemental materials.

SPR 85/58

ISSUE: Pieces of correspondence sent to a town board of selectmen were evaluated in an advisory opinion in order to determine the point at which they become public records and whether exemptions (a), (c) and/or (d) apply to them.

HELD: A correspondence may become a public record when it is opened by a person authorized to open it. Exemption (c) and (d), but not exemption (a), may apply to some of the contents of the pieces of correspondence.

RATIONALE: Correspondence "received" by a board is a public record subject to disclosure unless it falls within one of the exemptions of G. L. c. 4, s.7 (26). Correspondence addressed to the board is "received" when it are opened by an authorized person. Correspondencies addressed to an individual board member are "received" once the individual or his or her authorized agent opens the mail.

Exemption (a) applies to records made exempt from mandatory disclosure by statute. A record of an executive session falls within exemption (a) by virtue of G. L. c. 39, s.23B. Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 353 (1983). This record does not include pre-existing records discussed in executive session deliberations. Id. A piece of mail discussed in executive session is a pre-existing document. Accordingly, exemption (a) is not applicable and the correspondence must be disclosed unless another exemption in G. L. c. 4 s.7(26) applies.

Exemption (c) applies to personnel information of a personal nature related to a specific individual. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 432-434 (1983). Public employees have less of an expectation of privacy than private sector employees and, as such, their names, salaries, former employment information, and academic credentials contained in the pieces of correspondence are not so personal as to fall within exemption (c). Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978). However, physican reports, employment applications and references, and performance evaluations contained in the pieces of correspondence are sufficiently personal to invoke exemption (c). Globe, 388 Mass. at 434-435, SPR 84/115, SPR 84/89.

Exemption (d) applies to pieces of correspondence from other town governmental entities related to developing policy positions. It is not applicable to reasonably complete factual investigations and final administrative policies. Moore-McCormack Lines Inc. v. I.T.O. Corporation of Baltimore, 508 F.2d 945 (4th Cir 1974). Attorney General v. Board of Assessors of Woburn, 375 Mass. 430, 432 (1978).

SPR 85/135

ISSUE: The public records status of government contract bids containing trade secrets and agency evaluations of those bids was evaluated under exemptions (g), (h) and (d). The meaning of the word "prior" in the second clause of exemption (h) was defined.

HELD: The requested materials are public records.

RATIONALE: Refusal to disclose the requested information was based on the fact that the information allegedly contained trade secrets. Exemption (g) protects trade secrets voluntarily given to a governmental agency unless the information was submitted as a condition of receiving a government contract. Since the Massachusetts Legislature included its own government contract exception to its statute, it may be inferred that it rejected the broader protection given to trade secrets by the Federal Freedom of Information Act. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 432 - 433 (1983). The trade secrets exemption does not apply on its face when data is submitted as a condition of receiving a government contract. Therefore, exemption (g) does not apply to the requested records.

Exemption (h) applies to the competive bidding process. Proposals and bids are exempt from disclosure until the time for opening bids publicly or until the time for receipt of proposals has expired. Once a contract is awarded the proposals are public records. Since the contract was awarded exemption (h) does not apply.

Exemption (d) is a general provision that exempts inter and intra agency memoranda discussing agency policy. The second clause of exemption (h) specifically addresses the inter and intra agency memoranda evaluating contract bids and proposals exempting them from disclosure until a decision to enter negotiations has been made. General provisions yield to specific statutory provisions. Pereira v. New England LNG Co, 364 Mass. 109, 118 (1973). Therefore, exemption (d) does not apply.

Exemption (h) uses the words "until" and "prior" interchangeably. "Prior" in the second clause does not mean any memoranda discussing bids before the award of the contract remain exempt, but rather, they are exempt up to the time the contract is awarded.

SPR 85/206

ISSUE: A state agency's access procedures were examined. The topics of reproduction fees, appointments, custodianship and requesters' use of their own reproduction equipment were addressed.

RATIONALE: The regulations governing the fee that may be charged for the inspection and/or copying of a public record are found at 950 C.M.R. 32.06 (1)(1983). These regulations provide a maximum fee schedule. In addition, the fee charged for complying with a public records request must be reasonable. G. L. c. 66 s.10 (a). A fee is presumed reasonable if it equals or is less than the maximum fees set by the regulations.

The regulations encourage record custodians to maintain procedures allowing for access during regular business hours and other reasonable times. 950 C.M.R. 32.05 (1) and (2). In fulfilling large requests, a mutually convenient appointment may be be beneficial.

Any public official or employee having control or posession of a public record is deemed to be a record custodian for the purpose of providing access to public records. 950 C.M.R. 32.03. Executive Order No. 75 (the precursor of the Public Records Law) expressly provided that each government agency shall designate an employee responsible for public records requests. A custodian may also forward requests to a central office or legal department for a clarification of the requested documents public records status.

The question of whether or not a requester may use his or her own reprodction equipment is a matter within the discretion of the custodian. The only mandatory duty is to "furnish a copy". It may be accomplished by be actually furishing a physical copy or simply providing the means of copying (on government copying machines). The right to make copies is coextensive with the right to inspect. Direct-Mail Services, Inc. v. Registrar of Motor Vehicles, 296 Mass. 353-357 (1937).

SPR 85/113

ISSUE: A determination was made regarding the public record status of information contained in the records of the Massachusetts Housing Finance Agency's (MHFA) Home Mortgage Purchase Program. The information included: participants names; the addresses of properties mortgaged; the amounts of each mortgage granted; and the date each individual's participation was approved. A previous determination (SPR 83/156) is superseded by this determination.

HELD: The MHFA list containing the above information regarding the Home Mortgage Purchase Program is a public record.

RATIONALE: The requested information relates to MHFA's administration of a multi-million dollar low interest residential mortgage program. The program's purpose is to finance mortgages for low to moderate income owner occupied residences. The requested information would show whether the program participants met the eligibility requirements.

In the past it was determined that the privacy interest of the participants outweighed the public's right to know, therefore, the information fell within exemption (c) . SPR 83/156, (December 15, 1983). Exemption (c) requires a balance between the public's right to know against the individual's privacy interest. Attorney General v. Assistant Commisssioner of the Real Property Department of Boston, 380 Mass 683, 624 (1980). The public's right to know will prevail unless disclosure would publicize "intimate details" of "a highly personal nature." Id. The factors weighed to determine the scope of the privacy interest at stake are: the type of information sought; who supplied the information and under what circumstances; and whether the information sought is available from other sources. Torres v. Attorney General, 391 Mass. 1,9 (1984); Attorney General v. Assistant Commisssioner of the Real Property Department of Boston, 380 Mass. at 627; Attorney General v. Collector of Lynn, 377 Mass. 151, 158 (1979).

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A person's income and financial relationships are private facts. Collector of Lynn, 377 Mass. at 157; Opinion of the Justices, 375 Mass. 795, 803-808 (1978). Disclosure of such information is potentially embarrassing. Collector of Lynn, 377 Mass. 157. However, the privacy interest in this case is limited by the person's participation in a public mortgage program. An individuals financial relationship with a public agency is on a different footing than a similar relationship with a private person or entity. Id. In addition to the decreased expectation of privacy, participation in the MHFA mortgage program does not carry the stigma associated with participation in state welfare or social services programs. Moreover, the list of MHFA participants does not reveal detailed income information, but rather, approximate income. Finally, most of the requested information can be obtained from other sources. This fact decreases the potential privacy invasion. Collector of Lynn, 377 Mass. at 158, Hasting and Sons Publishing Co. v. City of Treasurer of Lynn, 374 Mass. 812, 813 n.3; Torrez v. Attorney General, 391 Mass. at 8. The MHFA routinely records most of the requested information in the appropriate registry of deeds. Therefore any privacy interest is extremely circumscribed since the income information in the record is only an approximation. No stigma is attached to participation in the mortgage program, and the reqested information may be obtained from other records.

On the other hand, the information sought relates to the MHFA's administration of a multi-million dollar home mortgage program. Disclosure of the participants identities is the only way the public can determine whether the program is being administed within the statutory and administrative guidelines. The public's right to know becomes paramount when the information sought relates to an alleged misuse of public authority despite allegations of potential embarrassment or fears of adverse publicity. George W. Prescott Publishing Co v. Register of Probate for Norfolk County, 395 Mass. 274, 279 (1985). The public's interest in seeing that important governmental objectives are being furthered will outweigh an individual's expectation of privacy in data relating to their income or financial affairs. Collector of Lynn, 377 Mass. at 157, 158 n.6; Opinion of the Justices, 375 Mass. at 808; George W. Prescott Publishing Co , 395 Mass. at 278-279. Therefore, the data is a public record.

SPR 85/213

ISSUE: Are the names, addresses and Medicaid fraud convictions of all medical professionals and facilities referred to in a law enforcement agency's report public records subject to disclosure pursuant to G. L. c. 66, s.10.

HELD: Such information is exempt from disclosure under exemption (a) of G. L. c. 4 s.7 (26).

RATIONALE: The information is considered criminal offender record information as defined in G. L. C. 6 s.167. G. L. c. 6 s.172 specifically limits access to such records to an enumerated group. The requester, as a reporter is not a member of the group authorized to have access to CORI data. Section 172 operates through exemption (a) which applies to records which are "specifically or by necessary implication exempted from disclosure by statute."

Section 172 only allows access to criminal offender record information to (a) criminal justice agencies; (b) such other agencies and individuals required to have access to such information by statute, and (c) any other agencies and individuals where it has been determined that the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy.

SPR 85/43

ISSUE: Requester sought an advisory opinion on the public records status of a list of licensed construction supervisors compiled by a town inspection department solely for internal use.

HELD: The fact that the list was originally compiled solely for internal use is not a relevant factor in determining its public records status. The list is a public record because it does not fall within an exemption found in G. L. c.4, s.7(26).

RATIONALE: A public record does not have to be made pursuant to law or be intended for public use. Hastings and Sons Publishing Co., v. City Treasurer of Lynn, 374 Mass. 812, 815-816 (1978). The only relevant inquiry in determining the public records status of the list is whether it falls within one or more of the exemptions found within G. L. c. 4, s.7(26).

SPR 85/131

ISSUE: Department of Social Services (DSS) records were evaluated under exemption (a). These records included the names and addresses of the day care centers where complaints of abuse, neglect, or mistreatment were confirmed by state investigations; the specific findings of the investigators; and, the outcome of the investigations.

HELD: The records are exempt from mandatory disclosure by virtue of G. L. c.119, ss.51E and 51F operating through exemption (a).

RATIONALE: Exemption (a) exempts from mandatory disclosure records that are specifically or by necessary implication exempted from disclosure by statue. The records were contained in confidential DSS reports prepared pursuant to G. L. c. 119, ss. 51B and 51D. The child's parent, guardian, or counsel, the reporting person or agency, the appropriate reveiw board, or a social worker assigned to the case, may upon request, and upon the approval of the Commissioner, receive a copy of the written report of the initial investigation. No such report shall be made available to any persons other than those enumerated in this section without the written and informed consent of the child's parent or guardian, the written approval of the Commissioner, or an order of a court of competent jurisdiction. G. L. c. 119, s.51E. DDS is also required to keep a central registry of information compiled from the 51A and 51B reports. Data and information relating to individual cases in the central registry shall be confidential and shall be made available only with the approval of the commissioner or upon court corder. G. L. c. 119, s. 51F. The requester here, is not one of the persons enumerated in this section and has not received the consent or approval the statutes require. Accordingly, these records fall within exemption (a) and are not public records.

SPR 85/151A

ISSUE: Where the subject of a record and the requester of the record are one person, does either clause of the privacy exemption, G. L. c. 4 s.7 (26)(c), preclude disclosure to that person.

HELD: The privacy exemption does not preclude a requester from viewing a record which pertains to her personally.

RATIONALE: The purpose of both clauses of the privacy exemption is to protect the privacy interests of the subject of the record. There is no threat to such privacy interests here, as a person cannot invade her own privacy.

SPR 86/007

ISSUE: The public records status of raw data on the race and language of identifiable individuals found on the 1986 street census forms was examined under exemption (c).

HELD: Raw data on street census forms relating to an individual's race and language are exempt from disclosure as an unwarranted invasion of privacy.

RATIONALE: The second clause of exemption (c) was examined. The exemption requires a balancing of the individual's privacy interest and the public's right to know. Here the individual street census respondent's privacy interests are substantial. Often race and language are major and deciding factors in how others view the individual. Disclosure of an individuals' race and language may cause the individual to experience discrimination solely on the basis of that information. On the other side of the balance no public interest is served by the disclosure of such information. Race and language are rarely, if ever, relevant factors in any legitimate inquiry. The public disclosure of this information in statistial form rather than in raw form (permitting identification of individuals) adequately serves the public interest. Statistcal information will reveal to the public whether legislative and council districts will be drawn in a non-discriminatory fashion. Therefore, the individuals' privacy interest in the non-disclosure of raw race and language data outweighs the public's interest in disclosure. The raw street census data on race and language are not public records.

SPR 85/133

ISSUE: The public records status of telephone records held by a governmental office and the question of fees charged for copies of public records were discussed.

HELD: Most calls made on official business or at public expense are public records. Copying fees are determined pursuant to 950 C.M.R. 32.06 (1) (c).

RATIONALE: Exemption (c) will exempt telephone records where the numbers called were either unlisted or where the calls were personal (not paid out of public funds). All other non-investigatory telephone record information of a governmental office is public. See SPR 85/06; Attorney General v. Asst. Commissioner of the Real Property Department of Boston, 380 Mass. 623, 627 (1980). 950 C.M.R. 32.06 (1) (a) limits the fee for photocopied records to twenty cents per page. Extensive research of records (20 minutes or more) may result in a prorated fee of six dollars per hour.

SPR 85/152

ISSUE: Are reports to the Commissioner of Banks pursuant to G. L. c. 170 s.19, concerning extensions of credit or loans to officers by their employer banks exempt from disclosure under exemption (c).

HELD: Reports of credit or loans to banks officers are exempt only to the extent that they reveal the identity of the particular officer(s).

RATIONALE: The exemption applicable to this issue is the second clause of G. L. c 4 s.7 (26) (c). It requires a balancing of the individual officer's privacy interest and the public's interest in disclosure. The true public concern is in whether the bank, as an entity, is adequately disclosing its dealings with its officers. The information which G. L. c. 170 s.19 requires the bank to disclose about the amount a particular officer has borrowed addresses the public's concerns. An individual officer's identification with such a report is of a highly personal nature. Once the details which identify a particular officer have been deleted, the remainder of the report becomes an independent public record subject to mandatory disclosure. G. L. c. 6, s.10 (a); Reinstein v. Police Commisssioner of Boston, 378 Mass. 281, 289-290 (none of the exemptions serve as a blanket exemption from disclosure).

SPR 85/151

ISSUE: Is the report of a hearing containing a hearing examiner's final determination on an employment matter exempt from disclosure under exemptions G. L. c. 4 s.7 (26) (d) and (e).

HELD: The report is not a memorandum used for inter or intra agency purposes. The report does not concern the development of any policy position where it is work related, and is maintained as a part of the government unit's files.

RATIONALE: A final policy position may be adopted at any given administrative level. The requested record is a particular personnel director's final position on a particular matter. As a final policy position, it is not exempt as pertaining to the development of a policy position being developed by the agency under exemption (d). G. L. c. 4 s.7 (26).

The report is not exempt under G. L. c. 4 s.7 (26) (e) as being personal to an employee and not maintained as part of the files of the governmental unit. The record is clearly work related and it is maintained as part of the files of the governmental unit.

SPR 85/211

ISSUE: The publication at a town meeting of an expert's dollar valuation of a tract of land under consideration for public purchase does not remove the remaining unpublished portion of the appraisal from exemption (i).

HELD: The remaining undisclosed portion of an appraisal is exempt.

RATIONALE: The purpose of exemption (i) is to provide governmental agencies engaged in the acquisition of real property through purchase or eminent domain proceedings with the same degree of confidentiality afforded to private parties. It exempts from disclosure: appraisals of real property acquired or to be acquired until (1) final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired. This exemption permits the witholding of real property appraisals only until the latest of the three specified events occurs. None of the above three conditions occurred in this case.

Arguably, an exemption should not be asserted if the requested information has already been published. However, if the data contained in the appraisals that formed the basis of the valuations has never been publicly disclosed, exemption (i) will apply to the remaining non-published data.

SPR 85/69

ISSUE: A town retirement board's referal of all requests to the state regulatory agency which possesses the orginal copies of the requested documents was discussed.

HELD: A copy of a public record is an independent record. Accordingly, the board, having custody of a copy of a record, must make it available to a requester pursuant to G. L. c. 66, s.10.

RATIONALE: A person seeking a public record cannot be required to request the document from another agency having the original copy. Legal Aid Secretary of Alameda County v. Shultz, 349 F. Supp. 271 (N.C. Cal. 1972). A public employee having control or possession of a copy of a public record is deemed to be the custodian of a public record for purposes of the Public Records Law, to the same extent as the custodian of the original records. 950 C.M.R. 32.03.

SPR 85/85

ISSUE: Requester was denied access to a list of members of a private, unincorporated, non-profit association whose function is to raise private funds for the benefit of a public library.

HELD: The privacy interests of members of a private association outweigh the public interest in disclosure.

RATIONALE: The second clause of exemption (c) requires a balance between the public's right to know and the individuals right to privacy. The public's right to know should prevail unless disclosure would publicize "intimate details" of a "highly personal nature." Attorney General v. Collecor of Lynn, 377 Mass. 151, 157 (1979). Where the role of an organization is social and charitable and the organization performs no government function, there is very little public interest in knowing the identities of its members. On the other hand, the organization's members expect anonymity. The privacy expectations of its members is a relevant factor under the exemption (c) balancing test. Torres v. Attorney General, 391 Mass. 1, 9-10 (1984). One's social contacts are recognized as protected private facts. NAACP v. Alabama, 357 U.S. 449 (1958). An unwarranted invasion of personal privacy occurs when disclosure of a list of members reveals with whom a citizen has chosen to associate. See SPR 83/119. Therefore, the privacy interest of the members of a private association outweighs the public's interest in disclosure. Exemption (c) applies.

SPR 85/118

ISSUE: Requester demanded copies of the nonexistent minutes of a subcommittee regarding the planning of a town police station.

HELD: There is no obligation to create a record in order to comply with a request for information.

RATIONALE: A subcommittee that does not meet as a quorum or take any action as a government body does not have to record minutes of the meeting for public access. (Middlesex District Attorney O.M.L. 85-8). A record must be either made or received by a governmental agency to be subject to disclosure. G. L. c.4, s.7(26). See Westinghouse Broadcasting Co. v. Sergeant-at-Arms of General Court, 375 Mass. 179, 183-184 (1979). There is no obligation to create a new record in order to comply with a request for information. 1976/77 Op. Atty. Gen. No. 32 (May 18, 1977).

SPR 85/107

ISSUE: The names and addresses of Section 8 landlords and the amounts of payments they received from a city housing authority under the Section 8 program were evaluated under exemption (c).

HELD: The addresses of the landlords fall under exemption (c). Their names and amounts of payments do not fall under exemption (c) and are thus public records.

RATIONALE: The second clause of exemption (c) permits withholding disclosure of records related to a specific individual where the harm to the individual's privacy interest caused by disclosure of a record outweighs the public interest in the record. Attorney General v. Assistant Commisssioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). The public interest prevails unless disclosure would publicize "intimate details" of a "highly personal nature." Disclosure of the fact that an individual is a Chapter 707 Program (G. L. c. 121B,ss 42-44) landlord and the amount of subsidy this landlord receives does not reveal intimate details of a highly personal nature. Attorney General v. Revere Housing Authority, Suffolk Superior Court, C.A. No 33500 (Judgement and Recommendation of Special Master); Attorney General v. Bennett, Suffolk Superior Court C.A. No. 35226. (Recommendation of the Special Master). This principle is equally applicable to Section 8 landlords despite the possibility that release of these landlord's addresses may indirectly identify the Section 8 tenants who reside in the same building as their landlords. Disclosure of the fact that an individual tentant receives a housing subsidy reveals an intimate detail of a highly personal nature. Real Property Department, 380 Mass at G26, n.2. Attorney General v. Torres, 391 Mass. 1,9 (1984). The risk of using the landlord's names to indirectly identify the tentants is insufficient, however, to warrant witholding the landlords' names under exemption (c). Revere, supra at 5-6.

SPR 85/83

ISSUE: Requester was denied access to the written and oral test scores of applicants for the position of police chief.

HELD: Oral interviews not reduced to documentary form are not public records as defined by G. L. c. 4, s.7(26). Written test scores of applicants for the position of police chief fall within exemption (c).

RATIONALE: A record must be made or received by a government entity to be subject to disclosure. G. L. c.4,s.7(26); Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General, 375 Mass. 179, 183-184 (1979). There is no obligation to create a new record to comply with a request for information. 1976/77 Op. Atty. Gen. No. 32 (May 18, 1977). Therefore, oral interviews that are not later reduced to documentary form are not public records. The written scores were examined under exemption (c), the privacy exemption. Its first clause protects personnel and medical files or information from disclosure. Balancing the public's interest in disclosure is not required. Personnel information is contained in personnel or similar files that are personal in nature and relate to a particular individual. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438 (1983). Such information is absolutely exempt from disclosure. Id. Subjective or evaluative employment data is "personnel information." Connolly v. Bromery, 15 Mass. App. Ct. 661, 664 (1983). Information such as grades evaluating academic or intellectual performance in personnel files are exempt under exemption (c). See SPR 83/135. Public employees have not relinquished all of their legitimate privacy interests despite their diminished expectation of privacy. Examination scores of public employees constitute "personnel information" under exemption (c) and are not public records as defined by G. L. c.4 s.7(26).

SPR 85/105

ISSUE: A monthly attendance report submitted to a town board of selectmen by the chief of police was evaluated under exemption (c).

HELD: Exemption (c) does not apply to a police department's attendance report.

RATIONALE: Exemption (c) absolutely exempts from mandatory disclosure information usually found in an employee's personnel file that relates to a specifically named individual and is of a personal nature. Globe Newspaper Co., v. Boston Retirement Board, 388 Mass. 427, 432-434,438 (1983). Attendance reports are the essence of a personnel file. Connolly v. Bromery, 15 Mass. App. Ct. 661, 664 (1983). "Information of a personal nature" is information which normally would not be shared with strangers or which if disclosed could harm the subject. Morrison v. School District #48, Washington County. 631 P. 2d 786 (Ore. App 1981). This report reveals the amount of regular and overtime hours worked in a given month, and the number of sick days, personal days, and vacation days taken by an individual officer during the same time period. Importantly, it does not include the nature of an illness or the reason for a personal day. The names and salaries of public employees are not the kind of private facts the Legislature intended to be exempt from mandatory disclosure. Hastings & Sons Publishing Co., v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978). The information in the report is analagous to salary information. It is relatively innocous and its disclosure would not reveal information of a "personal nature."

SPR 85/65

ISSUE: The public records status of a town board of selectmen's drafts of a final budget warrant for an annual town meeting was discussed.

HELD: The drafts are public records not falling within one of the exemptions of G. L. c. 4 s.7 (26).

RATIONALE: The town meeting is a public process requiring citizen participation. The town must issue a warrant giving public notice of the meeting. G. L. c. 39, s.10. The warrant must state the time and place of the meeting and the subjects to be discussed. The warrant is issued in advance, so that the meeting has a greater chance of being a success. Fitzgerald v. Selectman of Braintree, 296 Mass. 362, 367 (1937). The town budget is an issue that must be addressed in the warrant. G. L. c. 39, s.16. The budget begins as a draft warrant prepared in an open session by the town board of selectmen. The draft warrant is debated and altered by interaction between the board, a town finance committee, and the town's citizens. This process continues even after the selectman adopt a budget to be included in the final warrant. The warrant is made by the town and is thus a public record. G. L. c. 4, s.7(26). Since the selectman must place on the warrant certain articles brought by town voters, their function can become ministerial. G. L. c. 39, s.10. King v. Allen, 5 Mass. App. Ct. 868, 870 (1970). Also, the drafts must be prepared in public. G. L. c. 39, s.29B. Consequently, there is no danger that their disclosure would result in an unwarranted invasion of privacy or inhibit candid discussion. G. L. c. 4, s.7(26)(c)-(d).

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The Review

Trends in Government Disclosure

Public Records Division
Office of the Massachusetts Secretary of State
Michael J. Connolly, Secretary

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Determinations

'R 85/248

;SUE: Requester sought release of a city employee's statement to the city solicitor regarding an alleged threat made to the employee while carrying out his duties.

:LD: Exemption (b), (d), and (f) do not apply. The statement is a public record.

\TIONALE: Exemption (b) is designed to relieve agencies from the burden of assembling and maintaining for public inspection matters in which the public could not reasonably be expected to have an interest. Department of the Air Force v. Rose, 452 U.S. 352, 369-370 (1976) (Interpretation of the cognate provision of the Federal Freedom of Information Act). The Massachusetts statute is even more restrictive. To invoke exemption (b) in Massachusetts there must be an additional showing that the performance of a necessary governmental function requires such withholding. G.L. c.4, s.7 (26) (b). Since the requested record neither relates solely to internal personnel rules or practices nor interferes with the proper performance of a governmental function exemption (b) cannot apply.

Exemption (d) protects inter-agency and intra-agency memoranda or letters discussing legal and/or policy issues during the deliberative process. Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The information requested is not an inter-agency or intra-agency memorandum or letter. Further, it is a factual statement and it does not contain legal or policy analyses or recommend any course of action. Therefore, exemption (d) does not apply.

Finally, exemption (f), the exemption for investigatory materials, protects against premature disclosure of confidential investigative techniques, procedures, or sources of information. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976). The rationale for the exemption does not apply to complaints filed by public officials regarding threats made to them while performing their job. Part of the officials duty is to report incidents of unlawful conduct which occur in this manner. Therefore, this complaint is a public record and must be disclosed.

PR 85/296

SSUE: Requester sought access to a medical report of the Department of Health and Hospitals pertaining to the death of a friend.

ELD: The information is exempt under exemption (a).

ATIONALE: Exemption (a) permits the non-disclosure of records or materials that are specifically or by necessary implication exempted from disclosure by statute. The Department of Health and Hospitals relied upon G.L. c.111, s. 70 as the basis for non-disclosure of the requested data. It states in part:

> Hospitals and clinics subject to licenses by the department of public health ... shall keep records of the treatment of the cases under their care ... . Section ten of chapter sixty-six shall not apply to such records; ... provided such records may be inspected by the patient to whom they relate, or by his attorney upon delivery of a written authorization from said patient ... (emphasis added).

Since the requester is not the patient's attorney or the patient himself, the records are exempt from disclosure by G.L. c.111, s. 70 through exemption (a).

PR 85/287

SSUE: An advisory opinion was sought to determine the public records status of executive session minutes of the board of health.

ELD: Disclosure of the minutes would defeat the purpose for which the executive session was held, therefore, they are exempt.

ATIONALE: Exemption (a) exempts from disclosure records which are specifically or by necessary implication protected from disclosure by statute. G.L. c.39, s.23B, The Open Meeting Law, provides in part:

> The records of any executive session may remain secret as long as publication may defeat the lawful purpose of the executive session, but no longer.

The executive session in question was called to discuss complaints and charges brought against an individual. One of the purposes of the Open Meeting Law is to protect the privacy of the person who is the subject of such executive sessions. Mandatory disclosure of such information would be an invasion of that person's privacy and would defeat the purpose of the statute. Therefore, the minutes are exempt.

SPR 85/229

ISSUE: Requester sought records concerning the alleged sexual assault of her child.

HELD: Exemption (a) and (f) protect information provided to the authorities regarding an alleged sexual assault.

RATIONALE: Exemption (a) exempts records which are specifically or by necessary implication protected from disclosure by statute. G.L. c.43, s.97D is such a statute. It provides in part:

> all reports of rape and sexual assault or attempts to commit such offenses and all conversations between police officers and victims of said offenses shall not be public records...(emphasis added).

Therefore, reports of an alleged sexual assault provided to the authorities by the alleged victim or by the witnessess to an assault are exempt from public disclosure by G.L. c.41, s.97D through exemption (a).

Exemption (f) is designed to prevent the premature disclosure of the Commonwealth's case prior to trial. Disclosure of a statement provided by an alleged assailant during an on-going investigation prior to trial is the type of information which falls within the parameters of exemption (f).

SPR 85/291

ISSUE: Requester sought disclosure of complaints filed with the Board of Registration in Medicine against a physician.

HELD: G.L. c.112, s.5 exempts from disclosure complaints currently under investigation. Therefore, currently pending complaints are exempt under exemption (a). All resolved complaints, however, are public records.

RATIONALE: An agency is justified in withholding disclosure of specific records under exemption (a) if the language of the statute relied upon was meant to restrict the public's right to access under the public records law. Attorney General v. Collector of Lynn, 377 Mass. 151, 154 (1974). G. L. c. 112, s.5 specifically instructs the Board of Registration to:

> "keep confidential any complaint ... in connection with an investigation ... except... after the board has disposed of the matter ... by taking final action.

Therefore, the statute permits the board to withhold all unresolved complaints from disclosure. All other complaints must be disclosed.

SPR 85/64

ISSUE: An advisory opinion was requested to determine the public record status of a G.L. c.258, s.4 demand letter, a third party complaint brought against the town, and a memorandum provided to the selectmen which discusses litigation strategy. Copies of the third party complaint and the memorandum were provided for an in camera review.

HELD: The records are public.

RATIONALE: G.L. c.4, s.7(26) defines public records as documents "made or received" by an officer or employee of any governmental agency. The demand letter, third party complaint and memorandum fall within the broad definition of public records. The only exemptions from disclosure available for public records are those listed in G.L. c.4, s.7 (26) (a)-(l). Bougas v. Police Chief of Lexington, 371 Mass 59 (1976). The demand letter does not fall within any of the exemptions listed in G.L. c.4, s.7(26) (a)-(l). The only possible exemption applicable to the third party complaint is exemption (c). If the records contain information which if disclosed creates an unwarranted invasion of a person's privacy the records, or portions thereof, may be exempt. Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818-819(1979). Memorandum discussing litigation strategy may be exempt from disclosure under exemption (d). SPR 84/25.

SPR 86/03

ISSUE: Requester sought a copy of an investigative report, interviews with witnesses, and any physical evidence in the possession of the police department concerning the alleged sexual assault of her client.

HELD: The records are exempt from disclosure by exemption (a).

RATIONALE: An agency may withold records from disclsoure under exemption (a) when the language of the statute relied upon was meant to restrict the public's access to records under the Public Records Law. Attorney General v. Collection of Lynn, 375 Mass. 151, 154 (1979); Ottaway Newspaper Co. v. Appeals Court, 372 Mass. 539, 545-546 (1977). G.L. c.41, s.97D, states in part: "reports of rape and sexual assault, or attempts to commit such offenses and all conversations between police officers and victims shall not be public records and shall be maintained in such a way that assures their confidentiality." Therefore, the requested records are specifically exempted by statute from mandatory disclosure.

SPR 85/61

ISSUE: An advisory opinion was requested to determine the public records status of video tapes neither made nor received by a governmental agency or employee. The issue raised was whether a town can have constructive receipt of records.

HELD: The statute does not permit constructive receipt.

RATIONALE: G.L. c.4, s.7(26) states that a public record is one made or received by any officer or employee of a governmental agency subject to Public Records Law. Although the intent of the statute is to provide broad public access, the term "received" has been narrowly construed by the courts. A record must be received in fact. Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General Court, 375 Mass. 179, 182-184 (1978). Therefore, the fact that a governmental agency is entitled to receive records, but does not exercise that right, does not subject the record to disclosure.

Since it has been determined that the video tape is not a public record, the Supervisor of Public Records does not have the authority to order its disclosure under G.L. c.66, s.10.

SPR 86/01

ISSUE: Requester sought a copy of a report prepared by the police department in connection with an incident at the school department.

HELD: The report is a public record.

RATIONALE: Investigatory materials may be exempt from disclosure under exemption (f). The purpose of exemption (f) is to prevent the disclosure of confidential investigative techniques, procedures, or sources of information, to encourage individual citizens to come forward and speek freely with the police, and to allow the investigating officers to be candid in recording their observations. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 61-62 (1976). However, the present case does not involve an on-going investigation and no future investigations are planned. Furthermore, no charges have or will be filed against the individual involved in the incident. Finally, since the witness whose name, address, and comment appear in the report is a state employee who has an obligation to report such incidents, the danger of disclosure inhibiting other state employees from coming forward in the future to assist in investigations is not present. Therefore, the report is a public record.

SPR 85/267

ISSUE: Requester sought disclosure of appraisals on a piece of land that was the subject of eminent domain proceedings.

HELD: When the parcel ceased being the subject of eminent domain proceedings the appraisals became public records.

RATIONALE: The appraisals requested were compiled as part of an eminent domain proceeding. Therefore, exemption (i) merits consideration. The purpose of this exemption is to provide governmental agencies engaged in acquiring real property, by purchase or eminent domain proceedings, with the same degree of confidentiality afforded to private parties. It permits withholding of real property appraisals until either an agreement is entered into, any litigation relative to such appraisal has ended or the time within which to commence litigation has expired. Since the parcel was no longer the subject of an eminent domain proceeding the requested appraisals are public records.

The incorporation of a public record into a record that is exempt does not automatically give that information exempt status. Globe Newspaper Co. v. Commissioner of Education, NO. 26128 at 2 (Suffolk Superior Court, 1978). Therefore, even if the requested data forms the basis for future appraisals, which themselves would be exempt from disclosure, that same data remains a public record.

SPR 85/198

ISSUE: Whether an opinion poll conducted exclusively by a constitutional officer's political campaign organization is a public record within the definition of G.L. c.4, s.7(26).

HELD: No.

RATIONALE: The mandatory disclosure provisions of G.L. c.66, s.10(a) only apply to "any person having custody of any public record." The term custody has been narrowly construed. A record must be in the actual custody of a governmental official who is subject to the Public Records Law. Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General Court, 375 Mass. 179, 182-184 (1978). The raw data of the reqested poll was compiled by a candidate's political committee rather than a governmental entity and it was never in the custody of an official who is subject to the Public Records Law. Consequently, the mandatory disclosure provisions of G.L. c.66, s.10 do not apply.

SPR 86/15

ISSUE: Whether records of a public employee's merit pay increases are exempt from disclosure under exemption (c)?

HELD: No

RATIONALE: In order to be exempt as "personnel files or information," the record must be one which is usually found in an employee's personnel file, it must relate to a specifically named individual and it must be of a personal nature. Public employees as a class have a diminished expectation of privacy in matters relating to their public employment. Names, salaries and addresses of public employees are not the type of personal facts the Legislature intented to protect under exemption (c). G.L. c.7, s.30 provides further evidence of this legislative intent as it specifically states:

> "... a record, open to public inspection, showing the name, residence,designation, rate of compensation and date of appointment or qualification of every such official and employee, and any increase in rate of salary or compensation paid him during the preceding fiscal year."

The records sought in this particular request are only monetary in nature. Merit pay increases are merely the result of the evaluative process and do not by themselves constitute the type of evaluative information which is exempt from disclosure.

SPR 85/192

ISSUE: Must a public records custodian disclose computer data in any form desired by requester?

HELD: Yes, if the desired format can be generated by existing programs.

RATIONALE: As long as the governmental agency has the computer software capability to generate a record in the particular format requested, it must do so, regardless of whether such data would ever be created in that form for its own purposes. The actual cost incurred for reproduction of computerized data (i.e. cost of computer tape and computer time used in reproduction) maybe charged as a reproduction fee.

SPR 86/49

ISSUE: Is an administrative journal of a State Police Crime Prevention and Control Unit (CPAC) located in a District Attorney's Office a public record?

HELD: Yes

RATIONALE: G.L. c.41, s.98F requires police departments to maintain a daily log and make all entries available to the public unless otherwise provided by law. CPAC investigates matters which are referred to it by state and local police. Therefore, CPAC is no more a separate "police department" within the meaning of G.L. c.41, s.98F than any other detective division of state and local police departments. CPAC has no lock-up facility and all persons arrested are taken to state and local police barracks. Consequently, the information required to be kept by G.L. c.41, s.98F (i.e. names, addresses and charges brought) will be noted in logs of a state and local police barracks. Accordingly, an administrative journal maintained by CPAC is not subject to mandatory disclosure under the police log statute.

Nevertheless, an administrative journal maintained by CPAC falls within the broad definition of public records. G.L. c.4, s.7 (26). The only exemption that merits consideration is exemption (f). This applies to any information contained in a CPAC administrative journal which if disclosed could prejudice the possibility of effective law enforcement. However, non-exempt, segregable portions of records are subject to mandatory disclosure. G.L. c.66, s.10(a). Therefore, the public records status of the individual entries noted in the CPAC administrative journal must be determined on a case by case basis before any denial of disclosure takes place.

SPR 86/10

ISSUE: The public records status of a record which is no longer in the possession of the custodian to whom the request was made.

HELD: There is no obligation to recreate a record.

RATIONALE: A record custodian has a mandatory duty to provide access to any requested public records that exist which is within his custody. A custodian is not obliged, however, to create a new record in order to respond to a request for information which he or she no longer possesses.

SPR 86/14

ISSUE: Whether the names of individuals who are general applicants for a public position are considered public records and if not, whether mention of the names at a public meeting makes them public record.

HELD: The names of general applicants are not public record but their mention at a public meeting would make them public record.

RATIONALE: Disclosure of the names of such applicants implicates their privacy interests. Therefore, exemption (c) merits consideration. The first clause of exemtpion (c) absolutely exempts personnel records which relate to a particular individual if such records are of a personal nature. The records in question obviously relate to particular individuals and the employment screening process is an integral part of the personnel process. "Personal nature" is commonly interpreted as information which would not be shared with strangers or which could harm the subject if disclosed. A career change is a personal matter and disclosure could harm the individual's relationship with a present employer. Accordingly, the names of general applicants are not a matter of public records.

G.L. c.39, s.23B, the Open Meeting Law, makes records of public meetings public records upon their creation. Consequently, the names of individuals which are revealed in this fashion are public records by virtue of the Open Meeting Law.

SPR 86/37

ISSUE: Requester sought disclosure of abatement orders issued by the fire department.

HELD: The information is a public record.

RATIONALE: Exemption (f), the investigatary exemption, was considered when determining the public records status of the abatement orders. Exemption (f) recognizes that the disclosure of certain investigatory materials could prejudice effective law enforcement. However, the ability to enforce fire code abatement orders is enhanced, not hindered, by disclosure. Therefore, abatement orders do not fall within the confines of exemption (f).

SPR 85/246

ISSUE: Requester sought a copy of the order requiring the police department to answer the phone with the message "you are being recorded."

HELD: Exemption (b) does not apply. The requested record is public and subject to disclosure.

RATIONALE: Exemption (b) is very narrow in scope. The exemption is designed to spare the government the trouble of disclosing "matters in which the public could not reasonably be expected to have an interest." Department of the Air Force v. Rose, 452 U.S. 352, 369 (1976) (Interpreting the cognate provision Federal Freedom of Information Act). The Massachusetts statute is even more restrictive. Along with the above guideline, there must be an additional showing that the proper performance of necessary governmental functions requires withholding of the data.

The record in question contains information which is of legitimate public interest. The public has a right to know when an order was issued and whether the order was properly enacted. The required recording is not merely a housekeeping matter in which the public could not reasonably have an interest. On the contrary, the public has a strong interest in protecting its expectation of privacy when contacting the police. The record is public and subject to disclosure.

SPR 85/193

ISSUE: Requester sought disclosure of the W-2 and 1099 forms of former public employees receiving accident disability pension benefits.

HELD: W-2 and 1099 forms contain both exempt and non-exempt information. Exemption (c) exempts Social Security numbers and the amount of salary withholdings.

RATIONALE: Social Security numbers and the amount of state, federal, and retirement withholdings are "intimate details" of a "highly personal nature ." See SPR 84/40. Data classified as such are exempt under exemption (c). Attorney General v. Collector of Lynn, 377 Mass. 151, 157 (1979). The remaining information contained in the W-2 and 1099 forms are public records subject to mandatory disclosure.

SPR 86/33

ISSUE: The public records status of a computer tape or disc. The fee that may be charged for a copy of a computer tape or disc.

HELD: Computer tapes and discs are public records and the actual cost of duplication may be charged.

RATIONALE: Physical form or characteristics of a record is irrelevant. A computer tape or disc is a public record subject to mandatory disclosure as long as the information contained within the record is public. G.L. c.4, s.7 (26). There appears to be no difference between providing information through computer software or the lease of a terminal in the government agency's computer and providing it through more conventional methods. 1970/71 Op. Atty Gen. 7 p.46.

Copies of public records shall be furnished upon payment of reasonable fees. G.L. c.66 s.10(a). For public records not susceptible to ordinary means of reproduction, the actual cost incurred may be assessed. 950 C.M.R. 32.06(1)(f). If the fee is expected to exceed ten ($10.00) dollars, the custodian must furnish the requester with a written good faith estimate of total cost prior to complying with the request. 950 C.M.R. 32.06(2).

Appellate Court Decisions

Seigle v. Barry
422 So. 2d 63 (Fla. App. 1982)

FACTS: Requester sought information stored in a school board's computers. The school board was willing to grant access in one format. The requester, however, wanted the information in another format. Requester offered to design and pay for the creation of such a program or to reimburse the school board for doing so. The school board refused. The circuit court ordered the school board to run the new program designed at the requester's expense. The school board appealed.

ISSUE: Whether there is right under the Public Records Law to obtain information in a particular format.

HELD: No. Access to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining public records. Access by the use of a specially designed program may be permitted within the discretion of the custodian. The custodian, however, may be required to create a new program where:

1. available programs do not access all of the public records stored in the computer;
2. available programs include exempt information necessitating a special program to delete the exempt information;
3. the format offered does not fairly and meaningfully represent the records;
4. the court determines other extraordinary circumstsnces exist warranting this special remedy.

Cumulative Subject Index

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The Review

Trends in Government Disclosure

Public Records Division
Office of the Massachusetts Secretary of State
Michael J. Connolly, Secretary

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SPR 85/179, SPR 85/185

ISSUE: An advisory opinion was sought on the public record status of names and resumes of applicants who were finalists for the position of city personnel director.

HELD: The identities and professional credentials of finalists for the position are public records. The personal, evaluative information contained in a resume is exempt under exemption (c).

RATIONALE: Exemption (c) exempts a listing of general applicants for a position of public employment. Attorney General v. School Committee of Northampton, 375 Mass 127, 132 (1978). However, once an applicant reaches the level of semi-finalist their expectation of privacy decreases and a decision must be made on a case by case basis. Northampton, 375 Mass, at 130. When an applicatant becomes a finalist his credentials are expected to be publicly known so that an informed decision can be made when selecting the best candidate.

A finalist's resume is likely to contain both exempt and non-exempt information. The listing of schools attended, and degrees received as well as past employer and job titles are public. A resume may also include information of a personal nature such as a listing of career objectives or self-evalvative reviews of past job performances. See Connolly v. Bromery, 15 Mass. App. Ct. 661, 664 (1985). Therefore, as personnel information of a personal nature these portions of a resume fall within the first clause of exemption (c) and are not public information.

SPR 85/225

ISSUE: Fees charged for public records.

HELD: A custodian may not charge for supervision or organizing records but may require a deposit before complying with a public records request.

RATIONALE: A custodian may assess a prorated fee of six dollars per hour for search time and segregation time. "Search time" is the time needed to locate, pull from the files, copy and reshelve or refile a public record. "Segregation time" is the time used to delete exempt data from a record which

also contains non-exempt data. A custodian may not charge for the supervision of a requester's inspection or the supervision of the copying of public records.

Search time may only be assessed for the time that a custodian would need to locate the requested records in a properly maintained records systems, as custodians are required to maintain procedures that will allow access to public records in his custody without unreasonable delay. Thus, where records are difficult to locate in part because they are in a state of disarray, a custodian may not assess a fee for the time needed to organize records in a manner that permits him to readily locate the requested matierals.

Custodians bear the burden of justifying the fees they assess for responding to a public records request. Therefore, a carefully itemized accounting of work performed is advised. Any final fee remains subject to review by the Supervisor of Public Records.

Because the Public Records Law states that copies of public records are to be furnished "upon the payment of a reasonable fee," a custodian may require payment before providing the requester with the record.

SPR 85/165

ISSUE: An advisory opinion was sought to determine whether data stored in a computer is a public record within the meaning of G. L. c. 4, s.7 (26); whether the record custodian is required to manipulate automated data into any format upon request; whether public officials or private citizens are entitled to have direct access to the custodian's computer; and the fees that may be assessed for the providing access to automated data.

HELD: The statutory definintion of "public record" includes information stored in computers. A record custodian is not obliged, however, to create a new record or rearrange an existing record to comply with a request. Direct access to public information stored in government computers is permitted. 950 C.M.R. 32.06 (1)(d) and 32.06 (1)(e) govern the fees a custodian may charge when responding to a request for computerized public records.

RATIONALE: Records automation raises numerous public access issues. The expansive definition of public records found in G. L. c.4, s.7(26) includes automated data. See SPR 84/140; 1970/71 Op. Atty. Gen. No.7 (August 28, 1970) p.43 at 46. A governmental entity must provide the same degree of public access to automated data as it provides to conventional written material.

Although custodians are required to make available the information they maintain, Torres v. Attorney General, 391 Mass. 1, 10 (1984), a custodian is not required to create or design new computer software to generate data in a desired format. Seigle v. Barry, 422 So. 2d. 63,66 (Fla. App. 1982); Yeager v. DEA, 678 F.2d. 315, 323 (D.C. Cir. 1982). If a requester designs or absorbs the cost of developing the new software, the custodian may use their discretion in determining whether to provide the data in the desired format.

G. L. c. 66, s. 10(a) permits direct access into a government computer from another individual's computer terminal as long as: the information sought is a public record; there is no danger to data stored in the computer; and the access does not unduly interfere with the agency's use of the computer. 1970/71 Op. Atty. Gen. No.7 (August 28, 1970) p.43 at 46. If a custodian purchases computer terminals for the purpose of facilitating access to public records, preference cannot be given to one category of requesters over another..

950 C.M.R. 32.06 (1)(d) and 32.06(1)(c) provide for fees a custodian may charge for providing computer printouts or "hardcopies" of automated public records. Up to fifty cents per page may be charged for printouts. The actual cost incurred by the custodian may be charged for the production of computer records other than printouts. See 1970/71 Op. Atty. Gen. No.7 (August 28, 1970) p. 43 at 46.

SPR 85/180

ISSUE: Requester sought access to 911 calls recorded by the police.

HELD: The names and addresses of the callers are exempt. The remainder of the call is a public record.

SPR 85/180 continued

RATIONALE: One of the purposes of exemption (f) is to encourage citizens to speak freely with the police. Bougas v. Chief of Police of Lexington, 371 Mass. 59 (1976). Therefore, exemption (f) protects the name and address of the caller. The remaining information is a public record. The 911 calls report incidents prior to any arrest or criminal charge, therefore the confidentially provisions of the Criminal Offender Record Information Act (CORI) are not applicable. A 911 call that meets the requirements of CORI will be exempt under exemption (a).

SPR 86/201

ISSUE: Custodian requested an advisory opinion regarding the public record status of computerized lists containing information collected from a variety of public records. The lists include names, addresses and partial social security numbers of licensees.

HELD: Neither exemption (a) nor (c) exempt the lists from disclosure.

RATIONALE: An agency is justified in withholding disclosure of records under exemption (a) where the language of the statute relied upon for the exemption specifically or by necessary implication exempts the information from disclosure. The language in the Fair Information Practices Act, G. L. c.66A, s.2(c) (FIPA) does not prohibit disclosure of public information. Instead, the statute provides for expedited access to some information to listed groups. See Attorney General v. Collector of Lynn, 377 Mass. 151, 154-155 (1979). Moreover, FIPA only applies to "personal data," the defintion of which expressly excludes any information contained in a public record.

Exemption (c) only applies when disclosure would publicize "intimate details" of a "highly personal" nature. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass 623, 626 (1985). Since the same information is readily available from the files of the custodian and is routinily provided to the public the privacy exemption cannot be invoked. Since social security numbers are universal identifiers the disclosure of which serves no public purpose, partial social security numbers are also

are also exempt if they can lead to the disclosure of the entire number.

Finally, a custodian cannot refuse to provide data in the requested form because the requester intends to use the information for commercial purposes. Direct Mail Service v. Registry of Motor Vechicles, 296 Mass 353, 356 (1937).

SPR 86/110

ISSUE: Custodian sought an advisory opinion to determine whether Assessors are obliged to furnish copies of material contained on a video laser disk in video laser disk form.

HELD: Copies of disks containing the images, absent the computer program contained on the disk, are public records.

RATIONALE: The information contained on the disks and the resulting printouts are public records. The statutory definition of "public record" includes all documentary materials or data regardless of form or characteristics. The program contained on the disk, however, is not a public record.

Public records are documentary materials or data. Computer programs contain instructions which direct the operation of a computer. Therefore, the program is a tool used in the processing of data, not data itself.

SPR 86/168

ISSUE: Requester sought access to hearing decisions of the Department of Mental Health which included the names of attorneys, department employees, witnesses, hearing officers, program sites and facilities.

HELD: The documents are public records absent a demonstrated risk of indirect identification of the record subject.

RATIONLE: Custodian withheld disclosure based on exemption (a), citing G. L. c. 123, s.36 as the operative statute. G. L. c. 123, s.36 lists the documents it specifically exempts from disclosure and it does not mention the requested document. Furthermore, the agency responsible for

interpreting G. L. c. 123, s.36 has previously determined that the requested documents are public as long as all identifying information is deleted. Therefore, the requested information is not exempt unless there exists a grave risk of indirectly indentifying the record subject. G. L. c. 4, s7(26)(c)(the privacy exemption); see also. Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427, 438; Department of the Air Force v. Rose, 425 U.S. 332, 380.

SPR 86/216

ISSUE

Requester sought information from the Office of Human Services which included a list of potential correctional institutional sites.

HELD:

The list is exempt from mandatory disclosure under exemption (d).

RATIONALE:

Exemption (d) provides a limited executive priviledge for the development of government policy. It applies to recommendations on legal and policy matters found within the deliberative process. See Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)(interpreting cognate federal provision); see also, Enviromental Proctection Agency v. Mink, 410 U.S. 73,89 (1973); Moore-McCormack Lines, Inc. v. I.T.O. Corporation of Baltimore, 508 F.2d 945 (4th Cir. 1974). Accordingly, materials which possess a deliberative or policy-making character are exempt from the mandatory disclosure provisions of the Public Records Law.

The list in question contains proposed future institutional sites. Disclosure of the recommendation of these potential sites would reveal a sensitive part of the agency's deliberative process concerning the development of its policy pertaining to the location of future correctional institutions. Premature disclosure of this list may impact adversely on deliberations concerning the appropriateness of a future site choice. Therefore, since the list contains recommendations on a policy being developed by Human Services, it falls within exemption (d) and is exempt from mandatory disclosure.

SPR 86/188

ISSUE: Requester sought information contained in the Standard Ambulance Report Form (SARF) used by professionals in the Emergency Medical Services (EMS) of Southeastern Massachusetts.

HELD: Information contained on a SARF which details a person's medical condition is exempt from disclosure by exemption (c).

RATIONALE: A portion of the information on the SARF concerns the identities and actions of EMS personnel. This information is public because of a public employee's diminished expectation of privacy. Hastings & Sons Publishing Company v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978); Pottle v. School Committee of Braintree, 395 Mass. 861, 866 (1985). Information concerning the subject's name, address, date of birth and sex are readily available from other sources, therefore this information is public. Pottle, 395 Mass. at 866 (1985); Torres v. Attorney General, 391 Mass. 1,9 (1984). Any medical information pertaining to the record subject's illness or injury, medical history, medication, allergies and medic alert information are exempt from disclosure by exemption (c). The custodian may either delete all the medical information and disclose the identifying information, or the custodian may delete all the identifying information and disclose the medical information. G. L. c. 4,s.7(26)(c)(The privacy exemption only applies to information concerning specifically named individuals).

SPR 85/202,SPR 85/217

ISSUE: The requester sought copies of correspondence sent to a superintendent of a school system, the educational background of the school superintendent, and statements made by the superintendent.

HELD: The requested educational background data and correspondence are public records. The requested explanatory statement, however, is not subject to disclosure since it is not contained in an existing record.

RATIONALE: The second clause of exemption (c) was examined for the request for educational background data. The exemption requires a balancing of the individual's privacy interest and the public's right to know. Here the public's right to know

that their public servants are competent outweighed the public employee's privacy interests. This type of information is routinely presented in both professional and social settings, is relatively innocous, and implicates no applicable privacy or public policy exemption. Eskaton Monterey Hospital v. Myers, 184 Cal. Rptr. 840, 843 (Cal.1982). Therefore, the request for educational background data does not fall within exemption (c) and is a public record. No other exemptions are applicable to the requested correspondence sent to the superintendent. Therefore, it is a public record subject to mandatory disclosure.

Finally, the Public Records Law applies only to those records which actually exist. A custodian is not compelled to create a record in order to satisfy a particular request. "Statements" and explanations of an individual's questions are not subject to disclosure if not contained in an existing record.

SPR 86/50

ISSUE: The requester sought handwritten minutes from a conservation commission's meeting that were prepared on a note book.

HELD: The requested information is a public record.

RATIONALE: The commission relied on exemption (e) as a basis for nondisclosure of the requested information. Exemption (e) exempts note books and other materials that are personal to an employee and not maintained as a part of the files of a governmental unit.

Exemption (e) clearly does not apply to materials prepared by employees as an aid in the discharge of their official duties See U.S. v. First Trust Co. of St. Paul, 251 F.2d 686 (C.A. 8th, 1958); and Public Affairs Associates Inc. v. Rickover, 268 F. Supp. 444 (D.C. 1967).

The plain language of the statutory definition of "public record" indicates that disclosure is not dependent upon the minutes' physical form. Thus, the handwritten notes become public records upon their creation.

No other exemptions are applicable. Therefore, the handwritten minutes are subject to mandatory disclosure.

SPR 86/63

ISSUE: Requester sought copies of opinion letters and memoranda submitted by a city solicitor to a local board.

HELD: No portions of the requested documents are exempt by virtue of either exemption (d) or the attorney-client privilege.

RATIONALE: Exemption (d) exempts from mandatory disclosure inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency. In order for a document to be part of the deliberative process it must make recommendations or express opinions on legal or policy matters. Vaughn v. Rosen, 523 F. 2d 1136. 1144 (D.C. Cir. 1975).

Many of the documents contained expert explanations of law. These do not fall within exemption (d). SPR 83/84 and SPR 896. Moreover. the recommendations in the memoranda were merely based upon inferences which could be drawn from factual investigations. These inferences are not exempt as deliberative or policy-making materials. Moore-McCormack Lines, Inc. v. I.T.O. Corporation of Baltimore, 508 F. 2d 945, 949 (4th Cir. 1974).

The attorney-client privilege, operating through Disciplinary Rule 4-101(B), does not exempt any of the requested data. A claim of exemption must be based on one of the statutory exemptions of the Public Records Law. Cf., District Attorney for Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629.

SPR 86/86

ISSUE: The requester sought an advisory opinion on whether the addresses of certain low income units of particular towns are a public record.

HELD: The addresses of the low income units are public records in this limited context.

RATIONALE: The second clause of exemption (c) was examined. The exemption requires a balancing between the individuals privacy rights and the public's right to know. Here the tenants privacy rights are substantial. However, these addresses were disclosed at a public meeting. The Open Meeting Law, G. L. c. 39, s.23B, makes the minutes of a

public meeting public record upon their creation. The addresses in this case were contained in the minutes of an open meeting. The minutes of an open meeting are a public record. Therefore, in this context the addresses are subject to mandatory disclosure.

SPR 86/99

ISSUE: The requester sought an advisory opinion concerning the obligation of a police department to respond to an extensive request for copies of its daily log.

HELD: Any person has a right to inspect any log maintained by the police department. at any reasonable time, and there is no limitation on the number of logs an individual may request to inspect.

RATIONALE: The public records status of the department daily log is governed by G. L. c. 41, s. 98F. It states in part: "... all entries in a daily log, shall, unless otherwise provided by law, be public records available without charge to the public during regular business hours and at all other reasonable times."

The segregability provision of the Public Records Law allows the redaction of any entries which are specifically exempted by a statute. The remaining entries are public records subject to mandatory disclosure.

SPR 85/297

ISSUE: A driver involved in an accident requested access to a motor vehicle accident report.

HELD: The requested report is a public record subject to disclosure.

RATIONALE: The information in a motor vechicle accident report contains information requiring consideration of exemptions (a), (c), and (f). When the Legislature placed these exemptions in the definition of public records it provided that any records considered public at that time would remain public despite the exemptions. St 1973, c.1050, s.6. Motor vechicle operator's accident reports were public records prior to adoption of the exemptions. Lord v. Registrar of Motor Vechicles, 347 Mass 608 (1964). Therefore, they remain public records.

SPR 85/297 continued

Any criminal offender record information contained in the accident report, however, is exempt from mandatory disclosure. The Criminal Offender Record Information Act (CORI), G. L. c.6, s.172. was enacted prior to the current definition of public records. The statute protects criminal data which concerns an identifiable individual. Therefore. information indicating that a driver has been charged with an offense for which there is the possibility of incarceration is exempt from mandatory disclosure by CORI through exemption (a).

Any person has a right to access public records. G. L. c.66. s.10(a). Access to public records is required whether the person seeking disclosure is intimately involved with the subject matter of the record or merely motivated by idle curiosity. Bougas v. Chief of Police of Lexington. 371 Mass 59, 64 (1976).

SPR 85/212

ISSUE: Requester sought disclosure of HUD rehabilitation program information including: names of all recipients; amount of money spent and the extent of work done on the recipients' homes; names and addresses of all contractors who worked on homes; and the names and titles of all town officials approving recipients and determining whether state building codes are met. Requester also questioned the $25.00 per hour research fee.

HELD: The names, addresses, and other identifying details of individuals in the hardship grant program are exempt. The remaining information is a public record.

RATIONALE: Exemption (c) applies to information disclosing "intimate details " of a "highly personal nature." Attorney General v. Assistant Commissioner of the Real Property Department of Boston. 380 Mass. 623, 625 (1980). Receipt of a low-interest mortgage from a government agency does not create a stigma or disclosure "intimate details" of a "highly personal nature." Therefore. the records are public. SPR 85/113; Real Property of Boston, 380 Mass. at 625. On the other hand. hardship grants do reveal the fact that an individual is in a potentially embarrassing financial situation. The nature of a hardship grant makes the information intimate and highly personal, therefore it creates a privacy interest which outweighs the publics' right to know. However. if all the identifying details in the record can be removed, eliminating the possibility

SPR 85/212 continued

of identifying the subject, the information is subject to disclosure. Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 289-290 (1979). The request for the names and addresses of all town officials who approved the recipients and determined whether the state building codes were complied with are public records. Public employees do not have the expectation of privacy enjoyed by their counterparts in the private sector. George W. Prescott Publishing Co. v. Register of Probate for Norfolk County, 395 Mass. 274 (1985); Hasting & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978). A custodian may charge a research fee of six dollars per hour.

SPR 85/162

ISSUE: Can a requester's status as a litigant preclude disclosure of a record by virtue of the attorney-client privilege and the work product doctrine?

HELD: No.

RATIONALE: A person's status as a litigant is irrelevant. The attorney-client privilege and the work-product doctrine are not implied exemptions to the mandatory disclosure provisions of the Public Records Law. Exemption (d) however, provides that records or segregable portions of records which relate to pending litigation may be exempt from disclosure if they concern the development of the public entity's litigation posture or strategy. Exemption (d) does not, however, provide a blanket exemption to all materials relating to pending litigation.

SPR 85/218

ISSUE: Requester sought information regarding the total amount of medicaid funding for abortions, the number of medicaid abortions, the identities of the doctors and institutions which receive medicaid funding for abortions and the amount of medicaid funding each particular doctor or institution receives.

HELD: The requested information is a public record.

RATIONALE: All of the above information was evaluted under exemption (c). The privacy and safety concerns of the physicians and institutions were weighed against the public's right to know. It was argued that the physicians and institutions have a privacy interest in the fact that they provide abortion services. Exemption (c) applies to individuals only, therefore, the names of institutions that receive medicaid funds for abortions are subject to disclosure.

The physician's expectation of privacy is limited by several factors. First, as licensed professionals, physician's identities and information relating to the practice of their profession are kept by the board of registration for public use. 76/77 Op. Atty. Gen. No. 32 (May 18, 1977). Second, the requested information may be obtained from other sources such as telephone directories. Therefore, the privacy interest of the physicians is reduced. Attorney General v. Collector of Lynn, 377 Mass. 151, 158 (1970); Hasting & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 813, n.3 (1978); Pottle v. School Committee of Braintree, 395 Mass. 861 (1985). Finally, all physician involvement in the program is voluntary. No physician in Massachusetts has a professional obligation to participate in abortions. G. L. c. 112, s.12 I (1984 ed.).

Other concerns raised by the physicians were unwarranted solicitations and the possibility of violence against them. Neither of these arguements, however, justify nondisclosure unless the threat of retribution is real and substantial. Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C. 1977)(The possibility that some individuals may received undesired solicitation did not bar disclosure of disabled officer's home addresses); Simpson v. Vance, 648 F.2d 10, 17 (D.C. Cir. 1980)(terrorist threats); Webb v. City of Shreveport, 371 So. 2d 316, 320 (La.App. 1979). Furthermore, the possibility of violence in this situation is purely speculative. Given the above analysis, the privacy interest of the physicians is minimal.

On the other hand, the public's right to understand and monitor government operations involving public funds regarding a major issue of public debate weigh heavily in favor of disclosure. Therefore, the public interest in knowing the requested information outweighs the individual physicians' privacy interest. Therefore, the requested data is a public record.

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